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Sup. Ct.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 8, 1944

CERTIORARI GRANTED MARCH 27, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 679

FRED TOYOSABURO KOREMATSU, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Southern Division of the United States District Court for the Northern District of California

No. 27635–W

UNITED STATES OF AMERICA, PLAINTIFF

vs.

FRED TOYOSABURO KOREMATSU, DEFENDANT

Information

(Public Law No. 503, Seventy-Seventh Congress, Chapter 191, Second Session, H. R. 6758)

Leave of Court being first had, Frank J. Hennessy, United States Attorney for said District, comes and for the United States of America informs this Court: that Fred Toyosaburo Korematsu (hereinafter called "said defendant"), being at all the times herein mentioned a person of Japanese ancestry, and being within the geographical limits of Military Area No. 1 as said Area is defined and described in Proclamation No. 1, dated March 2, 1942, issued by J. L. DeWitt, Commanding General, Western Defense Command, and Military Commander designated by the Secretary of War, pursuant to Executive Order No. 9066 of the President of the United States, dated February 19, 1942, did, on or about the 30th day of May 1942, at the City of San Leandro, County of Alameda, State of California, within said division and district, and within the geographical limits of Area No. 1, unlawfully, wilfully, and knowingly commit an act contrary to the restrictions applicable to said Area, and contrary to the order of the Secretary of War and of such Military Commander, in that he, the said defendant, was, at said time and place, and did, at said time and place, remain in that portion of Military Area No. 1 covered by Civilian Exclusion Order No. 34 of said Commanding General, J. L. DeWitt, issued on May 3, 1942, in which all persons of Japanese ancestry are excluded from, and no 2 permitted to remain in, the said City of San Leandro, County of Alameda, State of California, after 12 o'clock, noon, P. W. T., May 9, 1942; that at said time said defendant knew of the existence of said restrictions and order, and that his said act was in violation thereof.

FRANK J. HENNESSY,
United States Attorney.

UNITED STATES OF AMERICA,
State and Northern District of California,
City and County of San Francisco, ss:

Oliver T. Mansfield, being first duly sworn, deposes and says: That he is a Special Agent of the Federal Bureau of Investigation,

United States Department of Justice; that he has read the foregoing information; that he is familiar with the facts therein alleged concerning the offense therein described, and that the same are true of his own knowledge.

OLIVER T. MANSFIELD.

Subscribed and sworn to before me this 12th day of June 1942.

[SEAL] J. P. WELSH,
Deputy Clerk, U. S. District Court,
Nor. Dist. of California.

[Endorsed:] Presented in Open Court and Ordered filed June 12, 1942. Walter B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk.

3 In United States District Court

Demurrer to information

Filed June 20, 1942

Now comes Fred Toyosaburo Korematsu, defendant abovenamed, demurring to the information herein upon the following grounds, to wit:

I

The information fails to state facts sufficient to constitute an offense against the laws of the United States in that Executive Order No. 9066 of the President of the United States dated February 19, 1942, referred to therein and upon which it is based in part, is, on d also as construed and applied to the defend- stitutional and void upon all and each of s, to wit:

on and exercise of legislative power which is n Congress by the provisions of Section 1 and and 18 of Section 8 of Article I of the U. S. Con- s) d has never been delegated to the President by Congre

2. It is an abuse of Executive Power and in excess of any power lodged in the President by the provisions of Article II of the U. S. Constitution.

3. It is an arbitrary, unreasonable, and oppressive exercise of executive power in that it denies to citizens, and to defendant as a citizen, the privileges and immunities of national citizenship and of state citizenship in violation of the provisions of Subdivision 1 of Section 2 of Article IV of the U. S. Constitution.

4. It operates to violate defendant's right to be secure in his person and also in his house, papers, and effects against unreasonable search and seizure in violation of the provisions of the Fourth Amendment of the U. S. Constitution.

5. In that defendant's apprehension and detention thereunder was not and is not pursuant to a Warrant issued upon probably cause supported by Oath or affirmation particularly describing the person of defendant to be seized as is required by the provisions of the Fourth Amendment of the U. S. Constitution.

6. It operates to deprive defendant of his liberty without due process of law in violation of the Fifth Amendment of the U. S. Constitution.

7. It operates to deprive defendant of his property without due process of law in violation of the Fifth Amendment of the U. S. Constitution.

8. It operates to deny defendant the equal protection of the laws in violation of the Fifth Amendment of the U. S. Constitution.

9. It deprives defendant of his rights, privileges, immunities, and liberties of national citizenship; including, among others, the following, to wit: freedom of movement, the right to live and to work where he pleases, to exercise the right of free speech, press, and assemblage in the areas authorized to be prescribed thereunder, in violation of the due process clause of the Fifth Amendment of the U. S. Constitution.

10. In subjecting defendant to exclusion or forcible military evacuation from the areas to be prescribed thereunder under threat of arrest, fine, and imprisonment under Public Law No. 503, 77th Congress, 2nd Session, Chapter 191, it deprives defendant of the right to a speedy and public trial, and the incidents thereof, in violation of the Sixth Amendment of the U. S. Constitution.

11. It inflicts upon defendant a cruel and unusual punishment, to wit, evacuation from the areas prescribed and to be prescribed thereunder with the consequent loss of rights of national citizenship and also of state citizenship, or, in the alternative, arrest, fine and imprisonment pursuant to Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, approved March 21, 1942, in violation of the provisions of the Eighth Amendment of the U. S. Constitution.

12. It is a usurpation of power over rights which are retained by the people and, in consequence, inherent in defendant, and therein violative of the provisions of the Ninth Amendment of the U. S. Constitution.

13. It is a usurpation of power not delegated to the United States but reserved to the people, including defendant, and therein is in violation of the provisions of the Tenth Amendment of the U. S. Constitution.

14. It imposes upon defendant a choice between exclusion and evacuation from the areas to be prescribed thereunder and arrest, fine, and imprisonment pursuant to said Public Law, No. 503 for the exercise of constitutional rights and thereby imposes upon him, in the event of such evacuation, a condition of slavery and involuntary servitude which is forbidden by the provisions of the Thirteenth Amendment.

15. It operates to deprive defendant as a person born in the United States, and subject to the jurisdiction thereof, of the implied rights, privileges, immunities, and liberties of national citizenship, and also of state citizenship, in violation of the provisions of the Fourteenth Amendment of the U. S. Constitution.

16. It operates to deny or abridge the defendant's right to vote within the geographical areas prescribed or to be prescribed thereunder on account of his race and color in violation of the provisions of the Fifteenth Amendment of the U. S. Constitution.

17. It is void for uncertainty, indefiniteness, and vagueness and as wanting a proper delegation of such power from Congress since it appears that Congress has neither delegated any such power to the Chief Executive nor to any of his subordinate executive officials and has not laid down or prescribed any policies governing the exercise of any such power in connection with the issuance of any such executive orders, or provided for the designation of any specific military areas or zones by them or anyone, or provided for the exclusion or evacuation of defendant or any citizen or denizen therefrom, or provided for the regulation of the conduct of defendant or any citizen or denizen therein, or defined the nature, extent and limitations thereon, or established the standards, rules, and limitations thereof, or expressly left to the executive branch of government the making of any subordinate rules in aid of effective administration thereof within prescribed limits.

II

The information fails to state facts sufficient to constitute an offense against the laws of the United States in that Civilian Exclusion Order No. 34 issued May 3, 1942, by General J. L. DeWitt, as mentioned therein and upon which it is based, in part, is, on its face, and also as construed and applied to the defendant herein, unconstitutional and void upon all and each of the following grounds, to wit:

1. It is a usurpation and exercise of legislative power, which is lodged exclusively in Congress by the provisions of Section 1 and Subdivisions 1, 14, and 18 of Section 8 of Article I of the U. S. Constitution and has never been delegated to the President or to any of his subordinate executive officials by Congress.

2. It is a usurpation and abuse of executive power which has never been delegated by the President of the Secretary of War or to the military commander who proclaimed said Proclamation and issued said Civilian Exclusion Order No. 34, and hence is in excess of any power conferred upon the Executive Branch of government by the provisions of Article II of the U. S. Constitution and a usurpation of legislative power prohibited by the provisions of Section 1 of Article I of the U. S. Constitution.

3. It is, as applied, a grant of Title of Nobility by the United States to all citizens whose birth or lineage makes them "Aryan," "White," "Pink-Complexioned," or certain "Asiatic-Aryans" to the exclusion of citizens of Japanese ancestry who are descended from a mythical Sun-Goddess and hence in violation of the provisions of Subdivision 8 of Section 9 of Article I of the U. S. Constitution.

4. It is an arbitrary, oppressive, and unreasonable exercise of unconferred executive power in that it denies to citizens, and to defendant as a citizen, the privileges and immunities of national citizenship and also of state citizenship in violation of the provisions of Subdivision 1 of Section 2 of Article IV of the U. S. Constitution.

5. It operates to violate defendant's right to be secure in his person and also in his house, papers, and effects against unreasonable search and seizure in violation of the provisions of the Fourth Amendment of the U. S. Constitution.

6. In that defendant's apprehension and detention thereunder was not and is not pursuant to a Warrant issued upon probable cause supported by Oath or affirmation particularly describing the person to be seized as is required by the provisions of the Fourth Amendment of the U. S. Constitution.

7. It operates to deprive defendant of his liberty without due process of law in violation of the Fifth Amendment of the U. S. Constitution.

8. It operates to deprive defendant of his property without due process of law in violation of the Fifth Amendment of the U. S. Constitution.

9. It operates to deny defendant the equal protection of the laws in violation of the Fifth Amendment of the U. S. Constitution.

10. It operates to take defendant's private property for public use, without just compensation, in violation of the Fifth Amendment of the U. S. Constitution.

11. It deprives defendant of his rights, privileges, immunities, and liberties of national citizenship, including among others, the following, to wit: freedom of movement, the

right to live and to work where he chooses, to exercise the right of free speech, press, and assemblage in the areas prescribed or authorized to be prescribed thereunder, in violation of the due process clause of the Fifth Amendment of the U. S. Constitution.

12. In subjecting defendant to exclusion or forcible military evacuation from the areas to be prescribed thereunder under threat of prosecution under Public Law No. 503, 77th Congress, 2nd Session, Chapter 191, it deprives defendant of the right to a speedy and public trial, and the incidents thereof, in violation of the Sixth Amendment of the U. S. Constitution.

13. It inflicts upon defendant a cruel and unusual punishment, to wit, evacuation from the areas prescribed and to be prescribed thereunder and thereby, pursuant to Executive Order No. 9066, with the consequent loss of rights of national citizenship and also of state citizenship, or, in the alternative, arrest, fine, and imprisonment pursuant to Public Law 503, 77th Congress, 2nd Session, Chap. 191, approved March 21, 1942, in violation of the provisions of the Eighth Amendment of the U. S. Constitution.

14. It is a usurpation of power over rights which are retained by the people and, in consequence, inherent in defendant, and therein violative of the provisions of the Ninth Amendment of the U. S. Constitution.

15. It is a usurpation of power not delegated to the United States but reserved to the people, including the defendant, and therein is in violation of the provisions of the Tenth Amendment of the U. S. Constitution.

16. It imposes upon defendant a choice between exclusion and evacuation from the area to be prescribed thereunder and arrest, fine and imprisonment pursuant to said Public Law No. 503 for the exercise of constitutional rights, and thereby, imposes upon him, in the event of such evacuation, a condition of slavery and involuntary servitude which is forbidden by the provisions of the Thirteenth Amendment.

17. It operates to deprive defendant as a person born in the United States, and subject to the jurisdiction thereof, of the implied rights, privileges, immunities, and liberties of national citizenship, and also of state citizenship, in violation of the provisions of the Fourteenth Amendment of the U. S. Constitution.

18. It operates to deny or abridge the defendant's right to vote within the geographical areas prescribed or to be prescribed thereunder on account of his race and color in violation of the provisions of the Fifteenth Amendment of the U. S. Constitution.

19. It is void for uncertainty, indefiniteness and vagueness and as wanting a proper delegation of such power from Congress since it appears that Congress has neither delegated any such power

to the Chief Executive nor to any of his subordinate executive officials and has not laid down or prescribed any policies governing the exercise of any such power in connection with the
11 issuance of any such executive orders, or provided for the designation of any specific military areas or zones by them or anyone, or provided for the exclusion or evacuation of defendant or any citizen or denizen therefrom, or provided for the regulation of the conduct of defendant or any citizen or denizen therein, or defined the nature, extent and limitations thereon, or established the standards, rules and limitations thereof, or expressly left to the executive branch of government the making of any subordinate rules in aid of effective administration thereof within prescribed limits.

III

(A)

The information fails to state facts sufficient to constitute an offense against the laws of the United States in that Public Law 503, 77th Congress, 2nd Session, Chap. 191 (approved March 21, 1942), he is charged with having violated, on its face, and as construed and applied to defendant herein, is unconstitutional and void upon all and each of the following grounds, to wit:

1. As applied to defendant it violates the "common Defense and general Welfare of the United States" clause of Subdivision 1 of Section 8 of Article I of the U. S. Constitution, the citizens and denizens of the United States being as much a part of the United States within the meaning of said clause as the terrain it covers and the property it possesses, and also violates the "general Welfare" and the "Blessings of Liberty" clauses in the preamble to the U. S. Constitution.

2. It is a Bill of Attainder as applied to citizens of Jap-
12 anese ancestry and hence repugnant to the provisions of Subdivisions 3 of Section 9 of Article I of the U. S. Constitution.

3. It is, as applied, a grant of Title of Nobility by the United States to all citizens whose birth or lineage makes them "Aryan," "White," "Pink-Complexioned," or certain "Asiatic Aryans" to the exclusion of citizens of Japanese ancestry who are descended from a mythical Sun-Goddess and hence in violation of the provisions of Subdivision 8 of Section 9 of Article I of the U. S. Constitution.

4. It is an arbitrary, unreasonable, and oppressive exercise of legislative power in that it denies to citizens, and to defendant as a citizen, the privileges and immunities of national citizenship

and also of state citizenship in violation of the provisions of Subdivision 1 of Section 2 of Article IV of the U. S. Constitution.

5. It operates to deny defendant the free exercise of his religion, and abridges his right to free speech, and of the press, and of his right with others peaceably to assemble, and to petition the Government for a redress of Grievances in the areas prescribed or to be prescribed by or under the direction or authority of the President, the Secretary of War or such military commanders as may be designated, in violation of the First Amendment of the U. S. Constitution.

6. It operates to violate defendant's right to be secure in his person and also in his house, papers, and effects against unreasonable search and seizure in violation of the provisions of the Fourth Amendment of the U. S. Constitution.

7. In that defendant's apprehension and detention thereunder was not and is not pursuant to a Warrant issued upon probable cause supported by Oath or affirmation particularly describing the person of defendant to be seized as is required by the provisions of the Fourth Amendment of the U. S. Constitution.

8. It operates to deprive defendant of his liberty without due process of law in violation of the provisions of the Fifth Amendment of the U. S. Constitution.

9. It operates to deprive defendant of his property without due process of law in violation of the Fifth Amendment of the U. S. Constitution.

10. It operates to deny defendant the equal protection of the laws in violation of the Fifth Amendment of the U. S. Constitution.

11. It operates to take defendant's private property for public use, without just compensation, in violation of the Fifth Amendment of the U. S. Constitution.

12. It deprives defendant of his rights, privileges, immunities, and liberties of national citizenship, including among others, the following, to wit: freedom of movement, the right to live and to work where he chooses; to exercise the rights of free speech, free press, and assemblage in the areas prescribed or to be prescribed by or under the direction or authority of the President, the Secretary of War or such military commanders as may be designated, in violation of the due process clause of the Fifth Amendment of the U. S. Constitution.

13. In subjecting defendant to exclusion or forcible military evacuation from the military areas prescribed or to be prescribed thereunder under threat of prosecution

under said statute, it does, if the former choice be made, deprive defendant of the right to a speedy and public trial, and the incidents thereof, in violation of the Sixth Amendment of the U. S. Constitution.

14. In inflicts upon defendant a cruel and unusual punishment, to wit, evacuation from the areas prescribed or to be prescribed by or under the direction or authority of the President, the Secretary of War or such military commanders as may be designated, and the consequent loss of his rights of national citizenship and also of state citizenship, or, in the alternative, prosecution under said Act, in violation of the provisions of the Eighth Amendment of the U. S. Constitution.

15. In that the fine of $5,000 together with the imprisonment term thereby authorized to be imposed for a violation thereof is an excessive fine and penalty prohibited by the provisions of the Eighth Amendment of the U. S. Constitution.

16. It is a usurpation of power over rights which are retained by the people and, in consequence, inherent in defendant, and therein violative of the provisions of the Ninth Amendment of the U. S. Constitution.

17. It is a usurpation of power not delegated to the United States but reserved to the people, including the defendant, and therein is in violation of the provisions of the Tenth Amendment of the U. S. Constitution.

18. It imposes upon defendant a choice between exclusion or forcible evacuation by the military authorities from the
15 areas prescribed or to be prescribed under the direction or authority of the President, the Secretary of War, or such military commanders as may be designated, or, in the alternative, prosecution under said Act for the exercise of his constitutional rights and in the event of his election to be excluded or evacuated from such areas there is imposed upon him a condition of slavery and involuntary servitude which is repugnant to the provisions of the Thirteenth Amendment of the U. S. Constitution.

19. It operates to deprive defendant as a person born in the United States, and subject to the jurisdiction thereof, of the implied rights, privileges, immunities, and liberties of national citizenship, and also of state citizenship, in violation of the provisions of the Fourteenth Amendment of the U. S. Constitution.

20. It operates to deny or abridge the defendant's right to vote within the geographical areas prescribed or to be prescribed by or under the direction of the President, the Secretary of War, or such military commanders as may be designated, on account of his race or color, in violation of the Fifteenth Amendment.

21. It is void as an attempted approval, confirmation, or ratification of legislative power usurped and exercised by the President, the Secretary of War, and the military commander therein referred to, and by each of them, and an attempted incorporation of the Executive Order No. 9066, Public Proclamation No. 1, and Civilian Exclusion Order No. 34, therein by reference, and hence is not a proper exercise of legislative power under the provisions of Section 1 of Article I of the U. S. Constitution, and is void for uncertainty on the same ground.

III

(B)

The information fails to state facts sufficient to constitute an offense against the laws of the United States in that Public Law No. 503, 77th Congress, Chapter 191, 2d Session, H. R. 6758, approved March 21, 1942, upon which it is based is unconstitutional and void for uncertainty, vagueness, and indefiniteness in all and each of the following respects and upon all and each of the following grounds, to wit, in that it does not appear therein and it cannot be ascertained therefrom as follows:

1. What specific military areas or zones have been or may be set up or the geographical limits thereof, if any.

2. That there is any authority or power conferred or delegated to anyone whomsoever to prescribe any military areas or zones or any restrictions therefor.

3. What the nature and extent are, if any, of the restrictions therein referred to as being "restrictions applicable to any such area or zone," "or contrary to the order of the Secretary of War or any such military commander."

4. That there is any authority conferred upon the President by the federal constitution or delegated to him by Congress to issue an Executive order prescribing any military area or military zone or regulating the conduct of citizens therein.

5. That there is any authority conferred upon the Secretary of War by the federal constitution or delegated to him by Congress to issue an executive order prescribing any military area or military zone or regulating the conduct of citizens therein.

6. That there is any authority conferred upon "Any military commander designated by the Secretary of War" by the federal constitution or delegated to any such military commander by Congress to issue an executive order prescribing any military area or military zone or regulating the conduct of citizens therein.

7. How or the method by which defendant, or any person, shall be given notice or be informed of the restrictions applicable to "to any such area or zone" therein mentioned or of "the order of the Secretary of War or any such military commander" therein mentioned.

8. What the nature, character, extent and limitations are of the "restrictions applicable to any such area or zone" therein mentioned.

9. What the precise things or acts of omission or commission are which are "contrary to the order of the Secretary of War or any such military commander" as mentioned therein.

10. Whether or not the President has issued an Executive Order prescribing any military area or military zone.

11. Whether or not the Secretary of War has issued an executed order prescribing any military area or military zone.

12. Whether or not "any military commander designated by the Secretary of War" has issued an executive order prescribing any military area of military zone.

Wherefore defendant demands that this demurrer be sustained, that the information herein be dismissed and that he go hence without delay.

CLARENCE E. RUST,
Attorney for Defendant.

I hereby certify that the above and foregoing Demurrer to Information is well taken in point of law and is not interposed for the purpose of delay.

CLARENCE E. RUST,
Attorney for Defendant.

Receipt of a copy of the above and foregoing Demurrer to Information together with Points and Authorities in support thereof is hereby admitted this 20th day of June, 1942.

FRANK J. HENNESSY,
A. J. ZIRPOLI,
Attorneys for Plaintiff.

Points and authorities in support of demurrer to information.

A presidential proclamation has no effect as law in the absence of constitutional or congressional authorization (Muir v. Louisville & N. R. Co. 247 Fed. 888).

Neither the constitution nor constitutional rights can be suspended in wartime.

Ex parte Milligan, 4 Wall. (U. S.) 2; 18 L. Ed. 281.

Despan v. Olney, 7 Fed. Cases No. 3, 822.

U. S. v. Bernstein, 267 Fed. 296.

Griffin v. Wilcox, 21 Ind. 370.

See also: Comment of Chief Justice Hughes in Sterling v. Constantin, 287 U. S. 378, 402; 53 S. Ct. 190, 197.

Executive Order No. 9066 and Civilian Exclusion Order No. 34 are, and each of them is, in excess of executive power inasmuch as martial law has not been proclaimed by Congress which, to the exclusion of the President and the Judiciary, has power to declare martial law.

Ex parte Milligan, supra.

Congress cannot delegate its *legislative* power to the President.

Field v. Clark, 143 U. S. 649, 692.

16 Corp. Jur. Sec. 349.

Congress cannot authorize executive officials to promulgate rules and regulations of a legislative character.

Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241

Schechter Poultry Corp. v. U. S. 295 U. S. 495; 55 S. Ct. 837.

16 Corp. Jud. Sec. 352.

Congress may vest discretionary authority in officers charged with the administration of a given law, that is, it can authorize administrative officials to make rules or regulations relating to the administration or enforcement of the law, but before they can exercise such discretionary authority Congress must first have prescribed a policy, standard or rule for their guidance and expressly have marked out its nature and extent and the field in which it is to be operative and the limitations thereof, and have left to them the making of subordinate rules in aid of effective administration within prescribed limits. Each of these elements is wanting in the instant case. Civilian Exclusion Order No. 34 as applied to citizens of Japanese ancestry to the exclusion of other racial types of citizens was not issued pursuant to any power lodged in the military commander by the constitution or lodged in him by any Act of Congress and hence is void as a usurpation of power and void for uncertainty.

Panama Refining Co. v. Ryan, supra.

Schechter Poultry Co. v. U. S., supra.

16 Corp. Jur. Sec. 349 and 352.

The operation of the Fifth Amendment is not suspended in wartime.

U. S. v. Cohen Grocery, 41 S. Ct. 298, 299; 255 U. S. 81, 88.

Hamilton v. Kentucky Distilleries, 40 S. Ct. 106, 108; 251 U. S. 146.

The "equal protection of the laws" is included within the "due process" clause of the Fifth Amendment.

U. S. v. Yount (D. C. Pa.), 267 Fed. 861.

Sims v. Rives, 84 Fed. 2d. 871; 66 App. D. C. 24 cert. denied, 56 S. Ct. 960; 298 U. S. 682.

21 Racial discrimination is prohibited by the due process clause of the Fifth Amendment as a denial of the equal protection of the laws.

Yu Cong Eng v. Trinidad, 271 U. S. 500, 528; 46 S. Ct. 619, 626–7.

The Sixth Amendment is not suspended during wartime.

U. S. v. Cohen Grocery, supra.

"Freedom of movement" is a privilege of national citizenship.

Crandall v. Nevada, 6 Wall. 35, 48–9.

Williams v. Fears, 179 U. S. 270.

Twining v. New Jersey, 211 U. S. 78, 97.

People v. Edwards, 625 S. Ct. 164 (see concurring opinions).

The "right to live and to work" where one wills is a privilage of national citizenship.

Allgeyer v. Louisiana, 165 U. S. 578, 589.

Myer v. Nebraska, 262 U. S. 390, 399.

The arrest and imprisonment of a citizen without a warrant violates the Fourth Amendment.

Ex parte Harvell, 267 Fed. 997.

A law which expatriates or banishes a citizen by reason of race or color is a bill of attainder.

In re Young Sing Hee (C. C. Or.) 36 Fed. 437.

Respectfully submitted.

CLARENCE E. RUST,
Attorney for Defendant.

[File endorsement omitted.]

22 In United States District Court

Supplement to demurrer to information

Filed July 20, 1942

Now comes Fred Toyosaburo Korematsu, defendant above-named, filing this, his supplement to said demurrer, and demurs to said information upon the following additional grounds, to wit:

1. That Civilian Exclusion Order No. 34 mentioned therein is unconstitutional and void on its face and as applied to defendant herein in that it is an unlawful usurpation of Judicial Power forbidden by the provisions of Section 1 of Article III of the U. S. Constitution.

1. That Civilian Exclusion Order No. 34 mentioned therein is unconstitutional and void on its face and as applied to defendant herein in that it is an unlawful usurpation of Judicial Power for-

bidden by the provisions of Section 1 of Article III of the U. S. Constitution.

2. That said Civilian Exclusion Order and said Public Law No. 503 are unconstitutional and void on their faces and also as applied to defendant herein in that they contravene the provisions of Article III, Sec. 3, cl. 1 of the U. S. Constitution.

3. That said Civilian Exclusion Order No. 34 is invalid and void on its face and as applied herein in that it violates the Civil Rights Statutes, 8 U. S. C. A., Sec. 41, 42, and 43.

4. Public Law No. 503 is unconstitutional and void on its face and as applied herein in that it would give effect to Civilian Exclusion Order No. 34 and therein constitute an unexpressed and unlawful attempt to delegate judicial power to the military authorities in violation of the provisions of Section 1 of Article III of the U. S. Constitution.

Wherefore, defendant demands also that this supplemental demurrer to the information hereby be sustained, and the information be dismissed and that he go hence without delay.

CLARENCE E. RUST,
Attorney for Defendant.

23 I hereby certify that the above and foregoing Supplement To Demurrer To Information is well taken in point of law and is not interposed for the purpose of delay.

CLARENCE E. RUST,
Attorney for Defendant.

[File endorsement omitted.]

24 In United States District Court

Present: The Honorable MARTIN I. WELSH, District Judge, sitting in the Northern Division of this Court, at Sacramento, California.

[Title omitted.]

Order overruling Demurrer to Information

Aug. 31, 1942

The demurrer to the Information having been heretofore heard and submitted, being now fully considered, it is ordered that the demurrer be and the same is hereby overruled.

25 In District Court of The United States, Northern District of California, Southern Division

Present: The Honorable A. F. ST. SURE, District Judge, sitting for and on behalf of Honorable Martin I. Welsh, District Judge

No. 27635

UNITED STATES OF AMERICA

vs.

FRED TOYOSABURO KOREMATSU

Judgment

Sept. 8, 1942

This case came on regularly this day for entry of the plea of the defendant Fred Toyosaburo Korematsu and for hearing on Demurrer to Information. The defendant was present in Court in the custody of the Military Authorities and with his Attorneys Wayne M. Collins, Esq., and Clarence E. Rust, Esq., A. J. Zirpoli, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

The defendant was called to plead and thereupon the defendant enter a plea of "Not Guilty" to the charge contained in the Information. The defendant and the Attorneys orally waived a trial by Jury.

Thereupon the case proceeded to trial. Mr. Zirpoli made an opening statement to the Court on behalf of the United States. Oliver T. Mansfield was sworn and testified on behalf of the United States. Mr. Zirpoli offered in evidence and filed certain exhibits on behalf of the United States, which were marked U. S. Exhibits Nos. 1, 2, 3, 4. Thereupon the United States rested. Defendant, through his Attorney Mr. Collins, moved the Court to dismiss the Information herein and to enter a judgment of Not Guilty. Ordered said motion be denied. Fred Toyosaburo Korematsu was sworn and testified in his own behalf, and the defendant rested. Thereupon the evidence was closed. Mr. Collins renewed the motion to dismiss the Information and to enter a judgment of Not Guilty. Ordered said motion be denied. Thereupon the case was submitted to the Court, without argument, for consideration and decision and the same being fully considered, it is, by the Court, ordered that the defendant Fred Toyosaburo Korematsu be, and he is hereby adjudged guilty of the offense charged in the Information.

The defendant was called for judgment. Mr. Collins made a motion in arrest of judgment. After hearing Mr. Collins, it is ordered that said motion be denied. After hearing Mr. Collins and Mr. Zirpoli, it is ordered that the defendant Fred Toyo-
26 saburo Korematsu be placed on probation for the period of five (5) years, the terms and conditions of the probation to be stated to said defendant by the Probation Officer of this Court.

Further ordered that the Bond heretofore given for the appearance of the defendant be exonerated. Ordered pronouncing of judgment be suspended.

27 In United States District Court

Notice of appeal

Filed Sept. 11, 1942

Name and address of appellant: Fred Toyosaburo Korematsu, 10800 Edes Avenue, Oakland, Alameda County, California.

Name and address of appellant's attorney: Wayne M. Collins, Mills Building, San Francisco, California.

Offense: a misdemeanor, to wit, a violation of Public Law No. 503, Seventy-seventh Congress, Chapter 191, Second Session, H. R. 6758, in that defendant as a person of Japanese ancestry on May 30, 1942, knowingly remained in Military Area No. 1 prescribed by Public Proclamation No. 1 issued March 2, 1942, by J. L. DeWitt, Lt. General, U. S. A., Commanding General of the Western Defense Command, from which Military Area No. 1 he was prescribed by Civilian Exclusion Order No. 34 issued by said General on May 3, 1942, said Public Proclamation No. 1 and Civilian Exclusion Order being authorized ostensibly by Executive Order No. 9066 of the President of the United States dated February 19, 1942.

Date of Judgment: September 8, 1942.

Brief description of judgment or sentence: The defendant was found guilty by the above-entitled Court of the offense charged and was ordered placed on probation for a five (5) year period by said Court.

Name of prison where now confined, if not on bail: The defendant is not confined to a federal or state prison but is detained in custody by the United States Wartime Civil Control Administration at the Tanforan Assembly Center, San Bruno, San Mateo County, California, and is not on bail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from
28 the judgment and order above-mentioned on the grounds set forth below.

Dated: September 10, 1942.

FRED TOYOSABURO KOREMATSU,
Appellant.

Grounds of appeal

(1) The trial court erred in overruling defendant's demurrer to the information and supplement to demurrer to the information and in refusing to sustain the same, to dismiss the information and to discharge the defendant, to which the defendant duly and regularly excepted.

(2) The trial court erred in denying defendant's motion to dismiss the information and to render a judgment finding him not guilty of the offense charged and ordering him discharged made during the course of the trial at the close of the government's case in chief, to the denial of which defendant duly and regularly excepted.

(3) The trial court erred in denying defendant's motion to dismiss the information and to render a judgment finding him not guilty of the offense charged and ordering him discharged which was made during the course of the trial at the close of the defendant's case, to which denial the defendant duly and regularly excepted.

(4) The trial court erred in denying defendant's motion in arrest of judgment made at the conclusion of the trial immediately after the trial court found and pronounced the defendant guilty of the offense charged, to which denial the defendant duly and regularly excepted.

(5) The insufficiency of the evidence as a matter of law to sustain the finding of the trial court that the defendant was guilty of the offense charged.

29 Dated: September 10, 1942.

WAYNE M. COLLINS.
Attorney for Appellant.

(Admission of Service.)
[File endorsement omitted.]

29-A (Affidavit in forma pauperis omitted in printing.)

29-C (Order dispensing with payment of fees and costs of printing record on appeal omitted in printing.)

30 In United States District Court

[Title omitted.]

Order fixing time to bill of exceptions

Sept. 16, 1942

This case came on regularly this day for instructions re appeal. After hearing A. J. Zirpoli, Esq., Assistant United States At-

torney, and Wayne M. Collins, Esq., Attorney for defendant, it is ordered that the defendant have thirty (30) days from date hereof within which to lodge proposed Bill of Exceptions; that the United States have ten (10) days thereafter within which to file proposed Amendments; and that thereafter ten (10) days be allowed for the settlement of the Bill of Exceptions.

31 In United States District Court

Bill of exceptions of defendant Fred Toyosaburo Korematsu

Filed Oct. 14, 1942

Be it remembered that heretofore, on June 12, 1942, the United States Attorney did file in the above-entitled Court an information against the defendant above named charging defendant with a violation of Public Law No. 503, Seventy-seventh Congress, Chapter 191, Second Session, H. R. 6759.

Be it further remembered that thereafter the defendant filed a demurrer to said information and a supplement to demurrer to said information and the same having thereafter been argued and submitted to the Court on briefs the Honorable Martin I. Welsh, United States District Judge, caused to be made and entered in said cause his order overruling said demurrer and supplement to demurrer to said information on the 31st day of August 1942, and that defendant duly and regularly orally excepted to said order overruling said demurrer and supplement to said demurrer to said information. (Tr. p. 1.)

Be it also remembered that thereafter, on September 8, 1942, the defendant was arraigned before the above-entitled Court, entered a plea of not guilty and waived a jury trial, as shown by the records on file in said cause, and that, thereafter, on said date the above-entitled cause proceeded to trial before the Honorable A. F. St. Sure, United States District Judge, sitting without a jury, the United States being represented by the Honorable Frank J. Hennessy, United States Attorney in and for the Northern District of California, and A. J. Zirpoli, Esquire, Assistant United States Attorney, and the defendant being represented by Wayne M. Collins, Esquire.

Thereupon, at the request of the Court A. J. Zirpoli, Esquire, Assistant United States Attorney, made a brief statement
32 to the Court informing him that the parties had waived trial by jury and were ready to proceed to trial upon the information and defendant's plea of not guilty. He also rendered to the Court an oral statement of the nature of the case. Thereupon counsel for the United States and counsel for the defendant entered into the following oral stipulations, to wit:

Stipulations as to certain facts

The defendant, Fred Toyosaburo Korematsu, is a native-born citizen of the United States of America and is of Japanese parentage, his father and mother being nationals of Japan resident in California. The defendant is twenty-three years of age and was born in Oakland, Alameda County, California, on June 30, 1919.

On May 30, 1942, at the time of his arrest, the defendant was outside an established Assembly Center and was in the City of San Leandro, Alameda County, California, which lies within an area from which all persons of Japanese ancestry had been ordered excluded under Civilian Exclusion Order No. 34. Thereafter defendant was charged with the commission of a misdemeanor, to wit, a violation of Public Law No. 503, Seventy-seventh Congress, Chapter 191, Second Session, H. R. 6758, as appears from the information herein.

At the said time and place of his arrest the defendant knew he was then and there within the confines of Military Area No. 1, prescribed by Public Proclamation No. 1, from which he, as a person of Japanese ancestry, was prohibited from remaining by said Civilian Exclusion Order No. 34.

Under said Civilian Exclusion Order No. 34 only persons of Japanese ancestry, including nationals of Japan, American citizens of Japanese ancestry, and native-born children of Japa-
nese ancestry, have been prohibited from remaining in
33 and have been excluded from the military areas therein described.

The Court has judicial knowledge and takes judicial notice of Executive Order No. 9066 of the President promulgated February 19, 1942, and of the following proclamations and order promulgated by J. L. DeWitt, Lt. General, U. S. A., Commanding General of the Western Defense Command and Fourth Army, to wit, Public Proclamation No. 1 dated March 2, 1942, Public Proclamation No. 2 dated March 16, 1942, Public Proclamation No. 3 dated March 24, 1942, Public Proclamation No. 4 dated March 27, 1942, and Civilian Exclusion Order No. 34 dated May 3, 1942.

Thereupon, the United States to maintain the issues on its part to be maintained called as its first witness Oliver T. Mansfield:

TESTIMONY OF OLIVER T. MANSFIELD FOR THE UNITED STATES

Oliver T. Manfield, produced as a witness on behalf of the United States, being first duly sworn, testified substantially as follows:

My name is Oliver T. Mansfield and I am a Special Agent of the Federal Bureau of Investigation. I interviewed the defendant on May 31, 1942, and obtained from him a written statement.

(A written statement was then produced, was identified by the witness as the statement to which he referred, and was thereupon offered and received in evidence as U. S. Exhibit No. 1.)

U. S. Exhibit No. 1

"OAKLAND, CALIF.,
May 31, 1942.

I, Fred Toyosaburo Korematsu, make the following statement to Oliver T. Mansfield who has identified himself to me as a special agent of the Federal Bureau of Investigation.

I make this statement freely and voluntarily without threats or promises of any kind. I understand that it may be used against me in court proceeding.

My real name is Fred Toyosaburo Korematsu. I was born in Oakland, Calif., on Jan. 30, 1919.

My father's name is Kaksaburo Korematsu

(Page 2)

who was born in Japan. My mother's name is Kotsui Korematsu and she was born in Japan.

I am of Japanese ancestry.

I have lived all my life in Oakland at 1080 Eden Ave. with my folks until four weeks before we had to evacuate. Then I left home telling them I was going to Nevada. Then instead I stayed in Oakland to earn enough money to take my girl with me to the Middle West. Her name is Miss Ida Boltano. She is a different nationality—Italian. Between the time I left home and the date before evacuation I lived 2 weeks in San Francisco during an operation on my face, and 2 wks. in

(Page 3)

Oakland with a friend. The operation was for the purpose of changing my appearance so that I would not be subjected to ostracism when my girl and I went East.

When the other Japanese were evacuated I remained in the Oakland district although I knew it was prohibited. I lived at 1428 47th Ave. for about three wks. and then moved to a new
35 room near the corner of Fruitvale and East 14th St., both in Oakland. I worked for one week at Anderson Trailer Center on MacArthur Blvd., and for a month at Trailer Co. of America on 7th and Gilman St. in Berkeley.

Since evacuation deadline I have used the name of Clyde Sarah where I roomed and where I worked.

(Page 4)

I also registered for a new social security card under that name and changed my draft registration card with ink remover to Clyde Sarah.

I have written and reread the above statement, of three and half pages and it is all true.

FRED T. KOREMATSU.

F. E. BLANKENFIELD.
Deputy Sheriff, Alameda County.
OLIVER T. MANSFIELD.
Special Agent, F. B. I."

(Witness continuing his testimony:)

I also interviewed the defendant on June 1, 1942, and obtained from him a written statement.

(A written statement was then produced, was identified by the witness as the statement to which he referred, and was thereupon offered and received in evidence as U. S. Exhibit No. 2.)

U. S. Exhibit No. 2

"OAKLAND, CALIF.,
*June 1, 19*42.

I, Fred Toyosaburo Korematsu make the following statement to Oliver T. Mansfield who has identified himself to me as a special agent of the Federal Bureau of Investigation.

36 I make this statement freely and voluntarily without threats or promises of any kind. I understand that it may be used against me in court proceeding.

I am of Japanese ancestry.

Since the evacuation dead-line I've been living and working in Alameda County, and have been seeing Ida Boitano about once or twice a week during that time. I usually meet her about 7:30 P. M., stay out nine or ten o'clock depending on what we do.

(Page 2)

On May 30, 1942, I was with Ida Boitano in San Leandro. I knew I was in prohibited area, and I was telling her I have quit my job and I was going to give myself up.

I have written and reread this one and a half page statement and it is all true.

FRED T. KOREMATSU.

Witnessed sig:
E. M. KING, *Dep. Sheriff #88.*
OLIVER T. MANSFIELD, *Special Agent, F. B. I.*"

(Witness continuing his testimony:)

At the time I obtained the statement of defendant on June 1, 1942, the defendant gave me permission to search his premises and his premises thereafter were searched. The San Leandro Police Department searched the person of defendant at the time of defendant's arrest and found a draft resignation certificate and also a draft notice of classification card, both of which were delivered to me. I showed him the notice of classification card and asked him about the name "Clyde Sarah" appearing thereon and he said it was a name assumed by him in an attempt to disguise his identity as a Japanese American born citizen; that
37 he had wanted to remain in Alameda County and in Oakland and in San Leandro because of friendly relationships with people there; that he considered himself an American and did not want to be evacuated; that he wanted to disguise his identity because his name "Korematsu" would give him away as Japanese and that for said reasons he adopted the name of Clyde Sarah.

(A draft registration certificate and a draft notice of classification card were then produced, were identified by the witness as the documents to which he referred, and were thereupon offered and received in evidence as U. S. Exhibits No. 3.)

Said draft "Registration Certificate," which is part of U. S. Exhibit No. 3 reads as follows:

U. S. Exhibit No. 3

"REGISTRATION CERTIFICATE

This is to certify that in accordance with the Selective Service Proclamation of the President of the United States

Clyde		Sarah
(First Name)	(Middle Name)	(Last Name)

1306	107th	Oakland	Alameda	Calif.

(No. and street or R. F. D. No. city or town, county and State)

has been duly registered this 16th day of Oct., 1942.

EUGENIE M. BECHERAS.
(Signature of registrar

Registrant Must Sign Here) CLYDE SARAH

Registrar for 104 Alameda Oakland Calif.
(Precinct) (Ward) (City or county) (State)

Be Alert { Keep in touch with your Local Board.
Notify Local Board immediately of change of address.

CARRY THIS CARD WITH YOU AT ALL TIMES

D. S. S. Form 2 16–17105
(3) 100–1115—1a(13)."

Said draft "Notice of Classification" card, which is part of U. S. Exhibit No. 3 reads as follows:

38 SELECTIVE SERVICE Penalty for Private Use to Avoid Payment of Postage, $300

F-K 5-31-42

LOCAL BOARD NO. 5
City Hall
Jul 22 1941
Stamp of Local Board.
San Leandro, Alameda Co.,
California.

Postmarked:
San Leandro, Calif
Jul 23.
5:30 P. M.
1941.

OFFICIAL BUSINESS

2259

Oakland, Calif."

194-111 30-1a (14)

(Thereupon the government produced a certified copy of record of birth of Fred Toyosaburo Korematsu duly certified by E. Giani, Deputy Registrar or Clerk of the Health Department of the City of Oakland, California, on April 8, 1942, showing that the defendant was born on January 30, 1919. The name and address of the defendant, the names, residences, color, or race, and birth places of his parents had been erased from the face thereof. The name of the defendant was also erased from the certificate of said E. Giani attached to said birth certificate. The certified copy of said birth certificate was then offered and received in evidence as U. S. Exhibit No. 4.)

The Government thereupon rested its case.

Motion to dismiss

Whereupon, counsel for the defendant moved the Court for a dismissal of the information and a judgment of acquittal upon each and all of the grounds set forth in the demurrer to the information and in the supplement to the demurrer to the information which motion for dismissal of the information and judgment of acquittal was by the Court denied, to which denial
39 defendant then and there took exception.

The defendant did not cross-examine the government's witness Oliver T. Mansfield.

FRED TOYOSABURO KOREMATSU, the defendant, taking the stand as a witness in his own behalf being first duly sworn, testified as follows:

My name is Fred Toyosaburo Korematsu and I am the defendant in this action. I am a single man. I live with my parents at 10800 Edes Street, Oakland, Alameda County, California, where I have resided for 23 years. I was born in Oakland, Alameda County, California, on June 30, 1919, and am 23 years of age. My father and mother were both born in Japan. I have three brothers each born in Oakland, Alameda County, California. During my life I have never departed from the continental limits of the United States. I graduated from Stoner's Grammar School in Oakland and from the Castlement High School in Oakland. I attended Los Angeles Junior College in Los Angeles for three months in 1938, where I studied chemistry. I had to work after school hours to earn my way through college but was compelled to abandon my studies because of inability to earn sufficient funds to support myself. I returned to work for my father in his nursery in Oakland. My father is now at the Tanforan Assembly Center and a man is taking over his nursery. Because of physical defects I was rejected by the Army when called for military duty under the Selective Service & Training Act of 1940 as I took up the study of welding and thereafter obtained employment as a welder for about two and a half months before the war. I am a registered voter in Alameda County and have been since attaining the age of 21 years. I have never renounced my American
40 citizenship. I registered for the draft under the Selective Service & Training Act of 1940. As a citizen of the United States I am ready, willing, and able to bear arms for this country. I am willing to enlist. As a citizen of the United States I am ready to render any service that I may be called upon to render to our Government in our war against the Axis nations, including the Empire of Japan. I do not owe any allegiance to any country or nation other than the United States of America. I have no dual allegiance. I have no dual citizenship. My birth has not, either with my consent or to my knowledge, been registered with any consul of the Empire of Japan. I have never attended and never cared to attend any Japanese school. I am not familiar with the Japanese language as a native. I speak Japanese in broken English. I cannot read the Japanese language either in manuscript or newspaper form. I am not acquainted with any of the Kan-ji characters or Chinese ideographs used in writing Japanese. I understand a little Japanese when it is spoken. As my mother does not understand my broken speech my elder brother interprets my English into Japanese for her. I have never been convicted of a felony and have never been charged with the commission of a felony. I have never been convicted of the commission of a misdemeanor and never charged with the commission of a mis-

demeanor except in this action. I have never renounced my citizenship in the United States of America.

CROSS-EXAMINATION

I am not a member of the Japanese Association. I do not know whether my birth has ever been registered through
41 the Japanese Association but I don't think it has. I don't think my brothers were registered with the Japanese Association. There was some discussion of registration long ago but there was no sense in it. My father said he didn't care and my brothers said there was no sense to it. My brothers and I, naturally, we belong to this country and we don't know any other country. I was willing to enlist in the Army but I had stomach ulcers and the doctors told me I was not fit for service. When rejected for the draft I spent $150 out of my own pocket to study welding and then went to work in the shipyards as a welder. I took the name of Clyde Sarah and caused a change of name to be made on my draft registration certificate for the purpose of concealing my identity as a person of Japanese ancestry. I also went to a physician and surgeon in San Francisco and had an operation on my face to change my facial appearance for the same purpose. He operated on me but I don't think he made any change in my appearance for when I went to the Tanforan Assembly Center everyone knew me and my folks didn't know the difference.

Thereupon, the cross-examination having been concluded the defendant rested.

Motion to dismiss

Whereupon, counsel for the defendant moved the Court for a dismissal of the information and a judgment finding the defendant not guilty upon each and all of the grounds set forth in the demurrer to the information and in the supplement to the demurrer to the information which motion for dismissal of the information and judgment of not guilty was by the Court denied, to which denial defendant then and there took exception.

Counsel for the parties thereupon waived argument to the
42 Court.

Finding and judgment

Thereupon the Court found and pronounced the defendant guilty of a violation of Public Law No. 503 as charged in the information.

Thereupon counsel for the defendant moved the Court in arrest of judgment upon each and all of the grounds set forth and in the

supplement to the demurrer to the information in the demurrer to the information which motion was by the Court denied, to which denial defendant then and there took exception.

Thereupon the court proceeded to the passing of judgment upon the defendant and thereupon rendered judgment which was thereafter entered in said cause as follows, to wit:

"I will place defendant upon probation for a perjod of five years."

The above Bill of Exceptions contains all of the evidence, oral and documentary, and all of the proceedings relating to the trial, conviction, motion in arrest of judgment and judgment, and sentence to probation for a period of five years.

Dated: October 10, 1942.

WAYNE M. COLLINS,
Attorney for Defendant
Fred Toyosaburo Korematsu ( ).

(Admission of service.)

43 In United States District Court

Stipulation re bill of exceptions

It is hereby stipulated by and between the attorneys for the United States and the Attorney for the defendant that the foregoing Bill of Exceptions on behalf of the above-named defendant on appeal herein to the Circuit Court of Appeals, in and for the Ninth Circuit, has been duly presented within the time allowed by law and rules and the order of this Court duly and regularly made in this behalf; that the plaintiff has no amendments to propose thereto; and that the same is in proper form and conforms to the truth and that it may be settled, allowed, approved and authenticated by this Court as the true Bill of Exceptions on appeal herein on behalf of said defendant and that it may be made a part of the records in this case.

Dated: October 14th, 1942.

WAYNE M. COLLINS,
Attorney for Defendant.
FRANK J. HENNESSY,
United States Attorney
A. J. ZIRPOLI,
Assistant United States Attorney.
Attorneys for Plaintiff.

44 In United States District Court

Order settling bill of exceptions

It is hereby ordered that the foregoing engrossed Bill of Exceptions, duly presented by the defendant and agreed to by the respective parties hereto, which has been presented to the Court within the time allowed and required by law and the rules and order of this Court, is hereby settled, allowed, signed and authenticated as in proper form and in conformity with the truth and as the true Bill of Exceptions herein, and is hereby made a part of the record in this case.

Dated: October 14, 1942.

A. F. ST. SURE,
United States District Judge.

[File endorsement omitted,]

45 In United States District Court

Assignment of errors

Filed Oct: 14, 1942

Fred Toyosaburo Korematsu, defendant in the above-entitled action, and plaintiff on appeal herein, having appealed to the United States Circuit Court of Appeal, in and for the Ninth Circuit, from the judgment and sentence to five year's probation made and entered in the above-entitled cause against him, and having given notice of appeal as provided by law, now makes and files the following Assignment of Errors herein, upon which he will rely for a reversal of said judgment and sentence upon appeal, and which errors and each of them are to the great detriment, injury and prejudice of said defendant and in violation of the right, liberties, privileges, and immunities conferred upon him by law, and said defendant and appellant says that in the record and proceedings in the above-entitled cause, upon the hearing and determination thereof, in the Southern Division of the United States District Court for the Northern District of California, there is manifest error in this, to wit:

I

The court erred in overruling the demurrer to the information and the supplement to the demurrer to the information interposed by the defendant, to which order overruling the same the defendant and apellant herein duly and regularly excepted.

II

The court erred in denying defendant's motion to dismiss the information and to render a judgment finding him not guilty of the offense charged made during the course of the trial at the close of the government's case in chief, which said motion was made upon each and all of the grounds set for the in the
46 demurrer to the information and in the supplement to the demurrer to the information, to the order denying which the defendant duly and regularly excepted.

III

The court erred in denying defendant's motion to dismiss the information and to render a judgment finding him not guilty of the offense charged made during the course of the trial at the close of the defendant's case, which said motion was made upon each and all of the grounds set forth in the demurrer to the information and in the supplement to the demurrer to the information, to the order denying which the defendant duly and regularly excepted.

IV

The court erred in denying defendant's motion in arrest of judgment made at the conclusion of the trial immediately after the trial court found and pronounced the defendant guilty of the offense charged in the information, which said motion was made upon each and all of the grounds set forth in the demurrer to the information and in the supplement to the demurrer to the information, to the order denying which the defendant duly and regularly excepted.

V

The court erred in finding, adjudging, and pronouncing the defendant guilty of the offense charged in the information and imposing upon him a sentence of five years probation because of the insufficiency of the evidence as a matter of law to sustain the finding of the court that the defendant was guilty of the offense charged, to which finding and pronouncement of judgment and sentence to five year's probation the defendant duly and regularly excepted;

47

VI

The information does not state facts sufficient to constitute a public offense under the laws of the United States in that Public Law No. 503, Seventy-seventh Congress, Chapter 191, Second Session, H. R. 6758, together with Executive Order No. 9066, Public Proclamations Nos. 1, 2, 3, and 4 and Civilian Exclusion Order No. 34, are, and each of them is, unconstitutional and void for uncertainty on their faces and also as construed and applied to defendant herein in each and all of the particulars set forth in the demurrer to the information and in the supplement to the demurrer to the information herein which are hereby incorporated herein by reference.

VII

The information does not state facts sufficient to constitute a public offense under the laws of the United States in that Public Law No. 503, Seventy-seventh Congress, Chapter 191, Second Session, H. R. 6758, together with Executive Order No. 9066, Public Proclamations Nos. 1, 2, 3, and 4 and Civilian Exclusion Order No. 34, are, and each of them is, unconstitutional and void, on their faces and also as construed and applied to defendant herein in each and all of the particulars set forth in the demurrer to the information and in the supplement to the demurrer to the information which are hereby incorporated herein by reference.

Wherefore, for the manifest errors committed by the court, the defendant and appellant demands that said judgment and conviction and sentence of five years probation be reversed.

Dated: October 14, 1942.

WAYNE M. COLLINS,
Attorney for Defendant and Appellant.

(Admission of service.)
[File endorsement omitted]

48 In United States District Court

Stipulation that original exhibits be transmitted to Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit

Filed Oct. 14, 1942

It is hereby stipulated that all original exhibits introduced on the trial of the above-entitled action be transmitted to the Clerk

of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: October 14th, 1942.

WAYNE M. COLLINS,
Attorney for Defendant,
FRANK J. HENNESSY,
United States Attorney,
A. J. ZIRPOLI,
Assistant United States Attorney,
Attorneys for Plaintiff.

49 In United States District Court

Order that original exhibits be transmitted to United States Circuit Court of Appeals for the Ninth Circuit

Filed Oct. 14, 1942

The parties hereto having stipulated thereto and good cause appearing therefor it is hereby ordered that the Clerk of the above-entitled Court transmit all original exhibits introduced on the trial of the above-entitled action to the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: October 14, 1942.

A. F. ST. SURE,
United States District Judge.

[File endorsement omitted.]

50 In United States District Court.

Praecipe

Filed Oct. 14, 1942

To the Clerk of the above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, to wit:

1. The information.
2. The demurrer to the information.
3. The supplement to the demurrer to the information.
4. Minute Order of the Court overruling the demurrer.
5. The judgment and sentence to five year's probation.

6. Notice of appeal.
7. Court order of September 16, 1942, fixing time within which to file, serve and settle Bill of Exceptions.
8. Bill of Exceptions.
9. Assignment of Errors.
10. Stipulation that original exhibits be transmitted to the Clerk of the U. S. Circuit Court of Appeals, in and for the Ninth Circuit.
11. Order that original exhibits be transmitted to the Clerk of the U. S. Circuit Court of Appeals, in and for the Ninth Circuit.
12. This Praecipe.

Dated: October 14, 1942.

WAYNE M. COLLINS,
Attorney for Defendant,
Fred Toyosaburo Korematsu, Appellant.

(Admission of service.)
[File endorsement omitted.]

51 In United States District Court

Supplemental praecipe

Filed Nov. 12, 1942

To the Clerk of the above-entitled Court:

You will please include in the transcript on appeal herein the following additional pleadings, orders and documents, to wit:

1. Affidavit of defendant (appellant) in forma pauperis for order waiving costs on appeal and expense of printing transcript on appeal.
2. Order Dispensing With Payment Of Fees And Costs of Printing Record On Appeal.
3. This Supplemental Praecipe to be attached to original Praecipe.

Dated: San Fransciso, California, November 12, 1942.

(Signed) WAYNE M. COLLINS,
Attorney for defendant,
Fred Toyosaburo Korematsu, appellant.

(Admission of service November 12, 1942.)
[File endorsement omitted.]

52 [Clerk's certificate to foregoing transcript omitted in printing.]

53 In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9248

FRED TOYOSABURO KOREMATSU, APPELLANT

vs.

UNITED STATES OF AMERICAN, APPELLEE

Statement of points to be relied upon on appeal

Filed Oct. 26, 1942.

Pursuant to the rules adopted for the above-entitled Court the appellant Fred Toyosaburo Korematsu files this, his statement of points relied upon in the above-entitled appeal, and hereby states that he relies upon each and all of his assignments of error included in the certified transcript on appeal herein.

Dated: October 26, 1942.

WAYNE M. COLLINS,
Attorney for appellant.

Service and receipt of a copy of the above and foregoing Statement of Points on Appeal Relied Upon is hereby admitted this 26th day of October 1942.

FRANK J. HENNESSY,
United States Attorney,
A. J. ZIRPOLI,
Asst. United States Attorney,
Attorneys for appellee.

[File endorsement omitted.]

54 In United States Circuit Court of Appeals for the
Ninth Circuit

Order on argument

Feb. 19, 1943

Ordered motion of appellee to dismiss appeal herein and cause on merits argued by Mr. Wayne Collins, counsel for appellant, and by Mr. A. J. Zirpoli, Assistant United States Attorney and Mr. Edward Ennis, Attorney, War Division, Department of Justice, counsel for appellee, and continued to tomorrow for further argument.

55 In United States Circuit Court of Appeals for the Ninth Circuit

Order submitting cause

Feb. 20, 1943

Ordered appeal herein further argued by Mr. Edward Ennis, Attorney, War Division, Department of Justice, counsel for appellee and by Mr. Wayne Collins, counsel for appellant, and submitted to the Court for consideration and decision.

56 In United States Circuit Court of Appeals for the Ninth Circuit

Order directing filing of opinions and filing and recording of judgment

Dec. 2, 1943

By direction of the Court, ordered that the opinion, opinion of Denman, C. J. concurring in the result but dissenting from the grounds of the majority opinion, and concurring opinion of Stephens, C. J. this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinions rendered.

57 In The United States Circuit Court of Appeals For The Ninth Circuit

No. 10248

FRED TOYOSABURO KOREMATSU, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE.

Upon Appeal From The District Court of The United States For The Northern District of California, Southern Division

Before WILBUR, GARRECHT, DENMAN, MATHEWS, HANEY, STEPHENS and HEALY, Circuit Judges.

Opinion

Filed Dec. 2, 1943

WILBUR, Circuit Judge:

Appellant was convicted of, and placed on probation for five years for, the offense of remaining in that portion of Military Area No. 1, covered by Civilian Exclusion Order No. 34 of the Commanding General, J. L. DeWitt, issued May 3, 1942, in which all persons of Japanese ancestry are excluded from, and not permitted

to remain in, the City of San Leandro, County of Alameda, State of California, after 12:00 o'clock noon, P. W. T., May 9, 1942. The defendant appealed.

The government moved to dismiss the appeal on the ground that the probationary order was not a final order, and hence was not appealable. Owing to a diversity of opinion among the Circuit Courts of Appeal, we certified to the Supreme Court the question of whether or not this court had jurisdiction of the appeal from the order placing the appellant on probation prior to sentence. The Supreme Court on the 1st day of June, 1943, answered that question in the affirmative, Korematsu v. United States, — U. S. —. Consequently the motion to dismiss is denied.

58 Appellant is a native born citizen of the United States of America of Japanese ancestry and claims that the proclamation violated by him was void.

This case was argued with two companion cases, both of which were subsequently certified to, and decided by, the Supreme Court on June 21, 1943, entitled Hirabayashi v. United States, — U. S. —, and Yasui v. United States, — U. S. —. These decisions involve the portions of the proclamation of General DeWitt imposing curfew restrictions upon Japanese citizens of the United States of Japanese ancestry. The Supreme Court held the curfew restrictions valid. The Supreme Court did not expressly pass upon the validity of the evacuation order which is involved in the case at bar. However, the Supreme Court held that under the constitution the government of the United States, in prosecuting a war, has power to do all that is necessary to the successful prosecution of a war although the exercise of those powers temporarily infringe some of the inherent rights and liberties of individual citizens which are recognized and guaranteed by the constitution.[1]

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[1] The Supreme Court, speaking through Chief Justice Stone, in Hirabayashi v. United States, — U. S. —, said, "* * * The war power of the national government is 'the power to wage war successfully.' See Charles Evans Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. Prize Cases, supra; Miller v. United States, 11 Wall. 268, 303–14; Stewart v. Kahn, 11 Wall. 493, 506–07; Selective Draft Law Cases, 245 U. S. 366; McKinley v. United States, 249 U. S. 397; United States v. Macintosh, 283 U. S. 605, 622–23. Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Ex parte Quirin, supra, [317 U. S. 1] 28–29; cf. Prize Cases, supra, 670; Martin v. Mott, 12 Wheat. 19, 29. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

"* * * If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty. Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty, just as does the police establishment of fire lines during a fire, or the confinement of people to their houses during an air raid alarm—neither of which could be thought to be an infringement of constitutional right."

59 We are of the opinion that this principle, thus decided, so clearly sustains the validity of the proclamation for evacuation, which is here involved, that it is not necessary to labor the point.[2]

The constitutional questions concerning the authority of Congress and of the President and his subordinate, Lieutenant General DeWitt, and questions of discrimination because of race or ancestry raised by the appellant were also considered and decided by the Supreme Court contrary to contentions of the appellant, and for that reason these questions require no further elaboration by this court.

Judgment affirmed.

60 *Separate opinion*

DENMAN, Circuit Judge, concurring in the result, but dissenting from the grounds of the majority opinion:

It is with regret that I find myself in profound disagreement with a majority of my colleagues in their treatment of the claims of unconstitutionality and other illegalities, later considered herein, of General DeWitt's order to Korematsu is a fellow citizen, who, because happening to have a common ancestry with the people under the dominion of the Japanese Government, with which we are at war after decades of peaceful intercourse, was required to report, for imprisonment in a military assembly stockade to await deportation for further such imprisonment.

Along with him are 70,000 American citizens—men, women and children—who, under similar orders, have been torn from their homes, farms, and places of business to be imprisoned together in large groups, first in barbed wire stockades called Assembly Centers, then, after deportation, in distant places under

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[2] (Hirabayashi v. United States, — U. S. —) "* * * The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066. Prize Cases, 2 Black 635, 671; Hamilton v. Dillin, 21 Wall. 73, 96-97; United States v. Heinszen & Co., 206 U. S. 370, 382-84; Tiaco v. Forbes, 228 U. S. 549, 556; Isbrandtsen Moller Co. v. United States, 300 U. S. 139, 146-48; Swayne & Hoyt, Ltd. v. United States, 300 U. S. 297, 300-03; Mason Co. v. Tax Comm'n, 302 U. S. 186, 208. And so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate pursuant to the Executive Order of the President. The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of. We must consider also whether, acting together, Congress and the Executive could leave it to the designated military commander to appraise the relevant conditions and on the basis of that appraisal to say whether, under the circumstances, the time and place were appropriate for the promulgation of the curfew order and whether the order itself was an appropriate means of carrying out the Executive Order for the 'protection against espionage and against sabotage to national defense materials, premises, and utilities.' For reasons presently to be stated, we conclude that it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its promulgation by the military commander involved no unlawful delegation of legislative power.

military guard. As Justice Murphy states in his concurring opinion in Hirabayashi v. United States, — U. S. —, 87 L. ed. 1337, 1352, their treatment is not unlike that of Hitler in so confining the Jews in his stockades.

The order here under consideration is the initial step in a unit succession of orders, held by the Supreme Court to be a "single program," (cf. infra) ultimately leading to such a cruel consummation. The court properly should take judicial notice of the fact that the result is that such forcible confinement of American citizens made Poston the third largest city in Arizona; Manzanar the second largest city in California east of the Sierras; and a large town on the Southern Pacific Railway and the National Highway between San Francisco and San Mateo of the assembly stockade at Tanforan. I cannot agree that taking judicial notice of these facts, known to the world, is "lending aid and comfort to the enemy," and hence that Korematsu's contentions be suppressed.

61 In this conspicuous appeal of such a member of one of America's minority groups, the opinion of this court disposes of Korematsu's major contentions without their mention, much less their consideration.[1] Outstanding is the avoidance of the question of imprisonment and deportation. It is buried in the euphemism "evacuation," without suggestion of its forced character or its accomplishment by compulsory confinement.

The opinion of this court concerning such unmentioned imprisonment for deportation is based solely upon an interpretation of the decision of the Supreme Court in Hirabayashi v. United States, — U. S. —, 87 L. ed. 1337, on the validity of a curfew order. That order is treated by that Court as analogous to the control of civilians by lines about a burning building, established by the police or firemen, or the requirement of citizens to remain indoors during the brief period of black-out.

In so disposing of his case, Korematsu has received a treatment similar to that accorded Hirabayashi in connection with our decision to refuse to decide the questions he brought before us and their certification to the Supreme Court without stating various of his contentions nor the facts on which he relied.[2]

Americans are to face a peace table at which our prestige and power will rest upon the belief of a world questioning Caucasian

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[1] In Anglo-Saxon law the right of a litigant to a reasoned opinion considering his contentions on issues raised was recognized at least as early as 1588 by Edmund Anderson on Elizabeth's Queen's Bench. See footnote 16, infra. Today it is codified in the nineteenth canon of the judicial ethics of the American Bar Association. 62 Rep. Am. Bar Assn. 1937, p. 1129.

[2] My dissent in Hirabayashi v. United States, No. 10308 our docket, filed March 28, 1943, which, because unreported and containing a consideration of facts pertinent to this concurring and dissenting opinion, is attached as Exhibit A and made a part hereof.

sincerity, a world which includes a billion Asiatics. There no one will shut his eyes to the Postons, Manzanaras, and Tanforans. One of the questions will be what sort of judicial consideration do minority groups of American citizens receive from the courts of a claimed democracy.

A. The Supreme Court refused to consider the validity of the orders to report for imprisonment.—This case was consolidated for argument with that of Hirabayashi v. United States, No. 1030[8] on the question of the validity of General DeWitt's orders. For the reason, stated in its certificate in the Hirabayashi case, that the question arising from such a measure as mass imprisonment to prevent espionage and sabotage was "difficult" and for which "this court knows of no decision" as a precedent,[2] a majority of this court avoided its decision. Cf. the last four paragraphs of my attached dissent. Instead, this court certified to the Supreme Court in that case the following question:

"1. Was Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942, *excluding* all persons of Japanese ancestry, *including American citizens of Japanese ancestry*, from and after 12 o'clock noon, May 16, 1942, from a particular area in Seattle, Washington, within Military Area No. 1 established by General DeWitt's Proclamation No. 1 of March 2, 1942, and *requiring* a responsible member of each family, and each individual living alone, affected by the order to *report* on May 11 or 12, 1942, *to the Civil Control Station in the said area in connection with said exclusion*, a constitutional exercise of the war power of the President derived from the Constitution and statutes of the United States?" [Italics supplied.]

The Supreme Court expressly refused to decide that question. Hirabayashi's indictment also charged a violation of an order entirely different from that one of the series of deportation orders with which the above quotation is concerned.[3] What it passed upon is the validity of General DeWitt's Proclamation No. 3 of March 23, 1942, imposing a curfew, not only on persons of Japanese descent but, on all enemy aliens for whom no general exclusion

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[2] "Rescet.—The case of the rescet [intervention] was moved again, and Shuttleworth said, that he cannot be received because he is named in the writ, and said, that he had searched all the books, and there is not one case where he which is named in the writ, may be rescetved.

"Anderson. What of that? shall not we give judgment because *it is not adjudged in the bookes before?* wee will give judgement *according to reason*, and if there bee no Reason in the Bookes, I will not regard them." [Italics supplied.]

English Reports, 75, King's Bench Book 4, 1019; Gouldsborough, 46, De Term, Trinitat. An. Reg. ELIZ.

Judge Stephen's opinion states that all the judges were agreed on the answer to the questions so certified.

63 order has ever been made. It required them to remain in their places of residence between the hours of 8 p. m. and 6 a. m.*

It permitted such movement of all these aliens within the curfew hours as pertained to their voluntary evacuation of the coastal military areas. This court's certificate in the Hirabayashi case certified the question of the validity of the curfew order, also because it found the question difficult and without precedent.

Concerning the question of the curfew order, as distinguished from the deportation order, the Supreme Court said,

"Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. * * * It is unnecessary to consider whether or to what extent such findings would support *orders differing from the curfew order.*" [Italics supplied.]

The Supreme Court found a precedent. As seen, it assimilated the curfew order to the fire lines and brief black-out restrictions. Here is no resemblance to the orders leading to the imprisonment of men, women, and children en masse in assembly center stockades for deportation. These are orders "differing from the curfew order" upon which the Supreme Court declined to pass.

64 Hence I dissent from the description of the offense in the first paragraph of the court's opinion that it consisted merely "of remaining in that portion of Military Order No. 1 covered by * * * Exclusion Order 34 * * * in which all persons of Japanese ancestry are excluded from, and not permitted to remain in, the City of San Leandro, County of Alameda, State of California, after 12:00 o'clock noon, P. W. T., May 9, 1942."

San Leandro is a town of small area and, for anything the majority opinion shows, all Korematsu had to do to satisfy Order 34 was to walk for a few minutes and pass out of the town's boundaries. The analogy with the police fire lines is obvious and if this were all, the opinion properly could say that it is unnecessary further "to labor the point."

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*"1. From and after 6:00 P. M. March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew."

"3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business of the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proclamations Numbers 1 and 2. Travel performer in [voluntary] change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours."

Korematsu's contention, in effect, is that his conviction was for the crime of not moving out of San Leandro into imprisonment in an assembly center. An inspection of the series of orders affecting him shows his position to be well taken. These orders at once required him not to leave and not to remain in the area. His sole alternative was imprisonment.

B. The facts, and the deportation and imprisonment orders.—Fred Korematsu, born in California of Japanese parents, was educated in California grammer schools, high school, and junior college, with white children. He grew up under the conditions of a Mongolian minority in a Caucasian majority, with its tragic contrast between the primary and high school teachings of freedom and equality, and, in his later social and economic life, the limitation and denial of what had been taught him by his white instructors, more fully considered in my attached dissent of March 28, 1943, in the Hirabayashi case.

There is no showing or suggestion that what Korematsu suffered from the contrast between the American teachings of personal liberty and equality and their denial caused any disloyalty. On the contrary, when rejected by his Selective Service Board, he spent $150.00 of his own funds to learn a ship mechanic's trade and thereafter, prior to Pearl Harbor, had been employed in a defense industry.

After that time he had made an unsuccessful attempt to have his features altered by plastic surgery, hoping thereby to escape the discrimination against his minority group of citizens.

This attempt is as pathetic as that of another of our minority groups—of those of one-sixteenth negro blood hoping to conceal the fact that they have not "passed over" into general Caucasian social intercourse.

Like all the remaining 70,000 Japanese descended citizens, Korematsu became subject to a series of Proclamations and Executive Orders which "are parts of a single program [leading to his imprisonment] and must be judged as such." Hirabayashi v. United States, — U. S. —, 87 L. ed. 1337, 1348.

On June 12, 1942, when he was arrested in San Leandro, Korematsu was subject to an order of General DeWitt prohibiting him from leaving Military Area No. 1. On March 27, 1942, Public Proclamation No. 4 was issued finding and ordering,

"It is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration." [Italics supplied.]

therefore

"* * * as a matter of military necessity that commencing at 12:—

midnight, P. W. T., March 29, 1942, all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."

The words "voluntary migrating" and "evacuation and resettlement" coupled with the words prohibiting him from leaving the limits of Military Area No. 1 seem an evasion of the real purpose of refusing any voluntary departure. The words "evacuation" and "resettlement" mean deportation and imprisonment in a relocation stockade. It was not restricting and regulating "voluntary" migration. It was denying it.

Korematsu was thus prohibited from leaving a military area in California, roughly extending 200 miles westerly from the Sierras to the Pacific and north and south for 600 miles. By a previous Military Proclamation No. 1, he was prohibited from moving from his "habitual residence" therein without filing a "change of residence" notice with his postmaster. He had filed no such notice of change of residence and hence was prohibited from leaving it.

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For purposes of the contemplated deportation this Military Area was ordered divided into smaller areas. Korematsu found himself in an area about San Leandro, in Alameda County, California. Similar small areas were created throughout the portions of California in Military Area No. 1. Had Korematsu left the San Leandro area, he would have entered another from which he was forbidden to leave.

Then followed Evacuation Order No. 34, with its accompanying directions respecting the deportation casually described, but not set forth, in the first paragraph of the majority opinion. It is as follows:

"CIVILIAN EXCLUSION ORDER NO. 34

"1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P. W. T., of Saturday, May 9, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows:" (Descriptive area including San Leandro.)

"2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A. M. and 5:00 P. M. Monday, May 4, 1942, or during the same hours on Tuesday, May 5, 1942, to the Civil Control Station located at: 920 'C' Street, Hayward, California.

"3. Any person subject to this order who fails to comply with any of its provisions or published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P. W. T., of Saturday, May 9, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942."

As seen, that order required Korematsu and all such unmarried citizens and the heads of families of such citizens to report
67 to a Civil Control Station by May 5, 1942, to receive directions for their imprisonment by May 9, 1942, in a stockade called an Assembly Center, from which the deportation was to be made.

The list of instructions made a part of Order No. 34 reveals the destruction of family life and of long established business relations. They are:

"THE FOLLOWING INSTRUCTIONS MUST BE OBSERVED

"1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 A. M. and 5:00 P. M. on *Monday, May 4*, 1942, or between 8:00 A. M. and 5:00 P. M. on *Tuesday, May 5, 1942.*

2. Evacuees must carry with them *on departure for the Assembly Center*, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls, and cups for each member of the family;

(e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied, and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. *The size and number of packages is limited to that which can be carried by the individual or family group.*

3. No pets of any kind will be permitted.

4. No personal items and no household goods *will be shipped* to the Assembly Center.

5. The United States Government through its agencies will provide for the storage *at the sole risk of the owner* of
68 the more substantial household items, such as iceboxes, washing machines, pianos, and other heavy furniture. Cooking utensils and other small items will be accepted for storage

if crated, packed, and plainly marked with the name and address of the owner. *Only one name and address will be used by a given family.*" [Italics supplied.]

The order is not free of the mean oppressiveness often found in regimentation of minority groups. After the Government had so ordered the stripping of the citizens of their belongings and their imprisonment, they are informed that their prospective warden "will provide for the storage of belongings at the sole risk of the owner."

It is apparent that what the disobeyed order actually was bears no resemblance to the order described in the first paragraph of this court's opinion.

C. Korematsu's contentions.—The Government's counsel contends that orders for such imprisonment were a proper exercise of the discretion of a military commander in such an area as Military District No. 1, with its reasonably anticipated Japanese invasion from the Pacific.

In the course of the hearing, the Government admitted that not one of these 70,000 Japanese descended citizen deportees had filed against him in any federal court of this circuit an indictment or information charging espionage, sabotage, or any treasonable act. This admission covered the five months from Pearl Harbor to General DeWitt's deportation order of May 10, 1942. Though in so conceding the fact, Korematsu's position is greatly strengthened, the majority opinion does not mention the admission. It is thus lost to him.

Korematsu argued that, assuming such imprisonment is otherwise valid, the selection of his Mongolian-blooded group for such treatment is so arbitrary and capricious a racial discrimination that it violates the due process clause of the Fifth Amendment. This argument is answered in the detailed consideration of the social and legal relationships of the people of Mongolian blood to the surrounding Caucasian population in the Pacific Coast states in my dissent in the Hirabayashi case. It is finally decided against him in the appeal in that case.

69 Korematsu contends that the principle established in Ex parte Milligan, 71 U. S. 2, applies a fortiori where no hearing of any kind was provided to establish the disloyalty or military menace of any of the citizens on the way to imprisonment, much less of Korematsu. It is contended that the prospective hanging of Milligan presents no difference in principle from the gross cruelty of the military mass imprisonment and deportation of these citizens. In both cases the civil courts were were functioning. In both cases the action of the military was not against soldiers subject to court martial. Neither Milligan's

ordered hanging nor Korematsu's imprisonment was the result of a judgment of a civil court.

His position is that if hanging of a civilian is not legal on a military order after court martial, a fortiori imprisonment is not legal on a military order without court martial. Also, if, as stated in the Milligan case, Congress cannot give to the military the power to order the hanging of a civilian after a military trial, it cannot give the military the power to order the imprisonment of civilians without any trial at all.

It seems clear to me that a decision on a curfew order likened to police fire lines, does not dispose of Korematsu's contention that the principles of the Milligan case apply to such imprisonment for deportation.

Korematsu also contends that such imprisonment violates the due process clause of the Fifth Amendment and that General DeWitt's orders are "lettres de cachet." Imprisonment without trial is a denial of the due process of the Fifth Amendment and such orders are the equivalent of lettres de cachet so far as the physical effect of the bodies of these citizens is concerned. It would be like the hypocrisy of the phrase "voluntary evacuation" to contend otherwise.

Korematsu further argues that such mass "banishment" is a cruel and unusual punishment in violation of the Eighth Amendment. That it is cruel and unusual need not be further pressed. It is nonetheless a matter for our consideration with reference to the discretionary power of General DeWitt, that the military order causing it may be construed as not the "punishment" contemplated by that amendment.

70 Korematsu, a shipwelder, further contends that his right to work is property, e. g. Traux v. Raich, 239 U. S. 33, 38, and that his imprisonment is a deprivation of that property in violation of the due process clause of the Fifth Amendment.

D. Ex parte Milligan is not controlling, because implicit in its reasoning is the hypothesis that in the absence of actual invasion the slower and more deliberate procedures of the civil courts are a sufficient protection from disloyal citizens lending aid to the enemy; and because the possibility of air invasion covering the state of Indiana in less than two hours was not even "lurking" in the minds of the Justices.

It was 37 years after the Milligan decision that the Wrights made the first successful flight with a craft heavier than air, and 13 years later that aviation had progressed to military utility.

It was in a world that could not conceive of an invasion faster than by movement on the ground that the Supreme Court held

"Martial law *cannot* arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.

"It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law.

"It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety
71 of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As *necessity creates the rule, so it limits its duration;* for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." [Italics supplied.]

Since "necessity creates the [martial] 'rule,'" it is not inconsistent with the principle established in the Milligan case that a threatened air invasion, directed by saboteur signals, which in an hour's time could destroy every federal-court house in California, presents the necessity for the substitute of military action against such sabotage for that of civil courts. The question of war necessity now before us could not even "lurk" in the record in the Milligan case.

The extent of the holding of "necessity" in that case is confined by the long established rule that matters not presented and considered by the court and a fortiori those beyond its possible consideration, are not there decided. Webster v. Fall, 266 U. S. 507, 511, and cases cited; K. V. O. S. Inc. v. Associated Press, 299 U. S. 269, 270.

E. General DeWitt's orders purposed for and leading to Korematsu's imprisonment, though violative of specific constitutional rights in the absence of any impending menace, during war

and the reasonable expectation of air invasion are within the area of military discretion of those acting under their then paramount constitutional power to wage war.

Korematsu's stress on his imprisonment as violative of several claimed constitutional rights is pertinent here with reference only to the limits of the control of governmental agencies compelled by some necessity to exercise, for the common safety, a coercion on the individual which otherwise such rights would prohibit.

In the peace time example of the fire lines, it is the existence or likelihood of fire that warrants the exclusion of the citizen from his home or office or ballot box. No one would question the violation of his constitutional right if, using the presence
72 of a controlled fire in a small detached building, a political police extended its fire lines around a large district of adverse voters and had prevented him from reaching his polling booth.

That Korematsu is entitled to the consideration by this court of the particular facts of his case as supporting the contention that the coercion exceeds the "allowable limits of military discretion," is what I understand to be the law as established in Sterling v. Constantin, 287 U. S. 378, 403. There, where martial law had been declared in Texas, the Supreme Court held certain acts of the governor to be violative of the Federal Constitution as in excess of his authority under the martial power the declaration had given him. In so ruling the Supreme Court held (pp. 400–401),

"It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. *What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.*" [Italics supplied.]

I take it that the exercise of the military power of a state is as high a function of government in the territory over which it has jurisdiction as is the exercise of that power by the United States in Military Area No. 1. Sterling v. Constantin so treats the states' military powers and its ratio decidendi is supported by Ex parte Milligan, supra; Mitchell v. Harmony, 13 How. 115, 134, and United States v. Russell, 13 Wall. 623, 628, all cases determining limits of the federal military authority. The extraordinary increase during the last decade in the exercise of federal administrative controls cannot be regarded as having changed the

states from entities as supreme in their reserved powers as is the Federal Government within its limited grant of powers, to mere agencies of the latter and hence made the Constantin case inapplicable.

By refusing to consider Korematsu's contentions, the majority are treating the Constantin case as if it had been overruled sub silentio by the Hirabayashi case. With this I cannot agree.

73 Since the Hirabayashi majority opinion, by its terms, is confined to a curfew order, it required no consideration of the Constantin case. Such a curfew order, considered no more than an exercise of an ordinary police function, is obviously "within the allowable limits of military discretion."

Assume the defense of the Coast had been under the command of some general so uneducated that he was oblivious to (1) the political struggles in Japan of a rising middle class for the creation of a form of democratic government, finally frustrated by assassination by a military group, to whom had been entrusted the education of a greater part of the nation's youth; (2) the fact that even after the declaration of martial law, over 75,000 Japanese, both citizen and alien, are freely living their accustomed lives on Oahu around Pearl Harbor and the Oahu military establishments; and (3) the fact that, while now the Chinese are among the most respected and liked of all our minority groups of alien ancestry for their commercial integrity and sense of social responsibility, only sixty years ago, in support of the slogan, "The Chinese Must Go," a blind passionate hatred attributed to the Chinese, as a people, the same essential inherited treacherous antagonism to the Caucasian and the same cruel ferocity of the soldiers of some former Chinese "War Lords" and of the Tong "hatchet men," as that with which other ignorant citizens, often played upon by the lower politicians, now characterize all the Japanese people.

Let us then assume that such a general had made findings and orders somewhat as follows:

"Whereas, I find that a Jap is a Jap, and that all Japanese descended people, male and female, are alike. They by heredity worship a sun emperor who is destined to conquer and rule all the people of the world. No education in American schools can eradicate this inherent instinct. No American environment can create any loyalty in any Jap to our flag. To America they will always be treacherous and because of a cruel and fanatical courage each is a constant threat of sabotage and espionage;

"Now, therefore, it is ordered

"(1) That all adult males of Japanese descent in Military Area No. 1 be imprisoned in a barbed wire stockade, each
74 with an Oregon boot of ten pounds weight attached to his right leg, and

"(2) That all adult females be so confined and each chained by the wrists, the chains light enough in weight and sufficient in length to allow them to prepare the food, do the laundering and other necessary services for all the prisoners and to care for their younger offspring."

Such findings and orders, inconceivable in any sane American commander such as General DeWitt, are postulated as an extreme exercise of military action to prevent espionage and sabotage. Under the principles established in Sterling v. Constantin, supra, we would not only consider their constitutionality but, it is strongly arguable, we would not convict Japanese descended citizens for disobeying them.

It is true that the majority opinion in the Hirabayashi case states (87 L. ed. pp. 1343–44),

"Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."

This I take to refer to "judgment," "discretion," and "wisdom" within the rational area of the necessities of war. I reject the concept that Japanese so treated would be compelled to remain in their chains, without the right to present to "any court" the contention that the order and its execution were unwarrantably "subversive of private right" within the rule of Sterling v. Constantin, supra.

Nor do I regard Justice Douglas' concurring statement (L. ed. page 1350) that "Where the orders under the present Act have some relation to 'protection against espionage and against sabotage,' our task is at an end," as meaning that any order, no matter how cruel and unnecessarily oppressive, must be upheld by the court merely because it has "some relation" to the military object to be attained.

75 For illustration, assume similar Congressional legislation with a set of military orders for the taking of property as that for the mass imprisonments and deportations of these 70,000 people. Then assume a need for blankets for soldiers for Alaska, where there is a landing of Japanese troops. There are sufficient blankets in a warehouse at Oakland, California, only six

miles away, but, as reported of the German officers in Norway and other occupied countries, our officers seize them at night from the beds of men, women and children in near-by homes in San Francisco. These seized blankets have not only "some relation" to a military need, but a direct relation "to protection" against the Alaska cold to be endured there by our soldiers.

I take it that Justice Douglas' words are not to be construed to mean that, in a prosecution in a civil court of a father resisting the taking of the blankets from his wife or children, the court must regard as stating no defense his offered evidence showing such taking and claiming it a violation of the Fifth Amendment. Yet such taking is no more "subversive of private rights" than these mass imprisonments and deportations. Under Sterling v. Constantin, supra, the difference is in the absence of military necessity, with the blankets easily available in Oakland.

No doubt on certiorari the Supreme Court will remove the doubt raised by these phrases, which the majority opinion of this court well may be taken to have resolved in favor of an uncontrolled military autocracy.

In so far as concerns the permitted area of "subversion of private right," General DeWitt's orders lie between the comparatively innocuous curfew restriction and such chaining of the Japanese descended citizens. Whether here there has been such subversion well may be regarded as a border-line question. The nearest analogy to General DeWitt's stockade confinement is the long-established and accepted process of quarantining of both the persons having such a dangerous and contagious disease as smallpox and those exposed to the disease, the latter until shown free of it after the period of its development has expired.

In my dissent in the Hirabayashi case are stated the several grounds of fact from which General DeWitt reasonably could infer that he could not speedily segregate from the Japa-
76 nese communities in Military Area No. 1 those persons likely to engage in sabotage and espionage, and hence a necessity that all must be imprisoned and deported. Nearly all

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[1] I note Judge Stephens' discussion of Admiral Perry's invasion of Japan which, though not offered as such, has a logical relationship to General DeWitt's orders.

Judge Stephens nowhere states that Japan's laws forbade any foreign vessels entering Japan and her known isolationist policy. In international law it was her right to eject Perry's fleet by force and if she had the power so to act it was her duty to use it to enforce her laws. Perry's invasion invited the use of such force.

In this situation our President's instructions to Perry when he had brought his fleet into the harbor of Yedo (now Tokyo)—that is, invaded in force forbidden waters—were "Make no use of force except in the last resort for defence, if attacked, and self preservation."

I do not agree that intelligent Japanese students are required to regard Perry's entry as not an act of war. Rather one would think it not illogical for them to make the inference that, having invited armed resistance, the instructions "Make no use of force, except in the last resort for defence, if attacked," to say to Perry, "Having invaded Japan with our Navy, in defiance of their laws, you are to fight them if they perform their obligation to enforce their laws." This is not offered as my inference.

of them, though omitted from this court's certificate, are re-
77 stated in the Supreme Court opinion in that case, but the one most strongly appealing to one living in the neighborhood of these communities and having dealings with their commercial houses is omitted. It is expressed in that dissent as

"Because of such limitation of social intercourse, people do not become familiar with the Mongolian physiognomy. The uniform yellow skin and, on first impression, a uniformity of facial structure, makes 'all Chinks and Japs look alike to me,' a common colloquialism. Hence arises a difficulty for General DeWitt's soldiers or the federal civil officers in picking out from the other Japanese crowded together in the segregated districts, and including men educated in Japan, the suspected saboteurs or spies or fugitives from a commando landing or hiding parachutists. Also the difficulty of identification of Japanese of known or suspected enemy aid, by descriptions telegraphed or written to white enforcement officers."

War always causes some cruel treatment of the innocent, the more so global war. It is customary for the Supreme and other federal courts to comment, where claims of oppression arising from Congressional legislation are not regarded as making the legislation invalid, that the claimant should look to Congress for his remedy. It is within that practice to state that where, as a war necessity, such wrongs are deliberately committed upon its citizens by a civilized nation, ordinary decent standards require that compensation must be made as in the case of our broken treaties with another Mongoloid group, the American Indians. One properly may hope that it will not be delayed (because it involves the admission of the wrong) until it is given to descendants many generations removed from their wronged ancestors.

Giving due weight to Korematsu's argument of the extent of the subversion of his private rights, constitutional and other, and of the degrading conditions imposed upon him and like citizens, it cannot be said that, considering the martial necessity arising

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but as a not illogical inference of an intelligent Japanese and a not illogical basis for Japan's claim that we invaded her without declaring war.

They well might ask, 'What would Americans feel in the same situation?' Assume we passed laws refusing the admission of Japanese vessels and planes into the continental United States. Then assume that Japan, in defiance of such laws, entered San Francisco Bay with a fleet of cruisers, and landed on our fields a fleet of war planes, for a peaceful discussion by their admiral of the repeal of such laws, the admiral having the same instructions from Hirohito as Perry had from the President.

My own opinion is that however beneficent we may claim our purposes, Perry let the genie out of the bottle. It made, at least, a causa sine qua non for Japan's seizure of South Western Asia, the Philippines, and other islands, and one historic basis for the hatred of the white man.

I regard a people, rightly or wrongly, taught for decades that they have historic grounds for hating the white race and more likely to have among their descendants who are our citizens, again suffering because not white, the degrading discriminations described by the Supreme Court in the Hirabayashi case, men who may be dangerously disloyal. Or, at least, that General DeWitt properly could so infer, in justification for his deportation orders.

from the danger of espionage and sabotage. General DeWitt's orders exceed the area of discretionary powers legally to be exercised by him in Military Area No. 1.

78 *Exhibit A to foregoing opinion*

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10308—March 28, 1943

GORDON KIYOSHI HIRABAYASHI, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Opinion of Denman, Circuit Judge, on his dissent from the certification of questions to the Supreme Court, and from the omission of facts therefrom.

DENMAN, Circuit Judge, dissenting:

One, at least, of my associates seems of the opinion that it is not within the power of a participating member of the court to dissent from the decision of the court that it certify questions to the Supreme Court under section 239 of the Judicial Code (28 U. S. C. A. 346) or from the content of the certificate. With this contention I do not agree.

Certification is a judicial action vitally affecting the litigants, since it transfers from one tribunal to another the forum of adjudication of the questions certified. One of the primary issues argued here is one of classification of Japanese descended citizens from other citizens descended from aliens of countries with which we are at war. The validity of such a classification is entirely a question of fact largely in the ill-defined area of judicial notice. The Supreme Court in civil cases takes judicial notice of the laws of the several states, yet believes justice is better served in most such cases if such questions are left to the respective circuit courts of appeals. If this be true of civil cases, it is true *a fortiori* 79 of such criminal cases as those involving psychological facts which, in my opinion, alone could warrant the discriminating cruelty with which these Mongoloid people have been treated.

Entirely apart from the question of costs of a second presentation to a distant tribunal, these unfortunate persons (if the certificate is granted) will have the decision of these questions of fact removed from the circuit court of appeals which is best qualified to find them. I dissent from a certification which denies to Hirabayashi* the exercise of our special knowledge of the psychology of these deported citizens. In this connection, Supreme Court rule 37 (1) provides that our "certificate shall contain a statement of the nature of the cause and *of the facts* on which such question or proposition of law arises." [Italics supplied.]

If it be unusual for a judge of a court in which he is a participant to dissent from his associates on the matter of a certification, the occasion is even more unusual.

Under the threat of penitentiary sentences to these 70,000 American citizens who have relied on the right they believe the Constitution gives them, we are driving from their homes to internment camps, not men alone, as with the deportation of the Dutch by the Germans, but their wives and children, without giving the latter the choice to remain in their homes. We are destroying their businesses, in effect, as if such citizens were enemy aliens. The destruction of their business connections means for many that they will not be able to return to their native areas; in effect, as were the French Canadians so taken to Louisiana.

While none of the appellants had yet been interned, the deportation order was but the initial step in a single plan ending in imprisonment in barb wired enclosures under military guard. Descended from Eastern Asiatics, they have been imprisoned as the Germans imprisoned the Western Asiatic descended Jews.

The first omission of fact from the certificate, which I regard as prejudicial to the appellants, is the admission by the Government, at the hearing here, that not one of these 70,000 Japanese descended citizen deportees had filed against him in any federal court of this circuit an indictment or information charging espionage, sabotage or any treasonable act. This admission covered the five months from Pearl Harbor to General DeWitt's deportation order of May 10, 1942. I dissent from the absence of such an admission of fact from the certificate.

I also dissent from the omission from the certificate of the following facts concerning the issue of a "present danger of im-

*This certification omits the customary statement of doubt or disagreement as to our own answers to its questions, from which one of the inferences is that we have no such doubt.

mediate evil [sabotage and espionage][c] or an intent to bring it about,"[d] which would warrant General DeWitt's order, in effect, of deportation of citizens without trial for their immediate imprisonment. They are facts from which pertinent inferences may be drawn, regarding the psychologic impulses and impelling convictions and personal loyalties and sympathies of a yellow Mongoloid body of citizens living in a predominantly Caucasian society and subject to legal and social compulsions because of race and color.

81. It is a matter of common knowledge to people of detached thinking in Pacific Coast communities, formerly living among these deported citizens, that their Mongoloid features and yellow skins have among them many persons of the same high spirit, intellectual integrity and consciousness of social obligation as have the most civilized of the surrounding Caucasians. What is also pertinent is the fact that they have the same contempt for any hypocrisy in their treatment by their white neighbors, and the same bitter resentment of a claim of their social inferiority as Americans have of the Nazi claim of Nordic racial supremacy. It is in the normal reactions of human beings to such treatment that are found factors in the problem of the validity of General DeWitt's orders.

Another admission of fact made at the hearing and not appearing in the record or in the certificate, is the presence among these citizens of a group of young men educated in Japan and returned to the United States to live in the Japanese communities. These men were admitted to be dangerously sympathetic with Japan in the present war.

What is peculiarly within our knowledge is that in our Pacific Coast schools, in their infancy and early childhood, the Japanese and Chinese children mix freely with their white companions.

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[c] The president's military zone and deportation order of February 19, 1942 and its enforcing provisions, are:

"Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104);

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, *from which any or all persons may be excluded*, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. . . .

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce *compliance* with the restrictions applicable to each Military area hereinabove authorized to be designated, *including the use of Federal troops* and other Federal Agencies, with authority to accept assistance of state and local agencies." (Italics supplied.)

[d] Justice Holmes in Abrams v. United States, 250 U. S. 616, 624.

They are taught to revere the flag with the freedoms it connotes. When they reach adolescence, with its mating instincts and its inevitable affections, which often know no boundaries set by complexion or cheekbones or slant of the eyes, freedom is denied them in the most powerful of human instincts by the laws against intermarriage with the Caucasians.[11] The strongest paternal discipline is exercised over the white children. They are told it is a degradation to mate with an Oriental; and the yellow skinned youth are made to feel a racial inferiority and in social contempt. Such facts are pertinent in determining whether General DeWitt is entitled to find, among a people suffering an humiliation so inconsistent with the equality of the flag teachings, that there will be those who will hesitate or fail to perform a citizen's duty in aiding his soldiers against the saboteur or spy.

The second most powerful indicia in the war zone commanded by General DeWitt of separateness and implied racial in-
82 feriority of the Mongoloid people, are the laws prohibiting them from owning agricultural land.[12] Many of the Japanese who immigrated here were farmers. Yet under these laws no child of Japanese parentage can be born on his alien father's farm. State decisions [13] show the evasions and deceits employed to satisfy that farmer's historic land hunger, which led to our own early westward migrations of the last century. Whether or not it is still a proper concept that the farmers constitute the "backbone of the nation," these 70,000 citizens know that those in farming communities are separated from their white companions by a fundamental social distinction, sometimes the more bitter in its expression by their European descended neighbors because of the superiority often shown by the Japanese in both energy and agricultural skill. These facts are entitled to be considered with reference to the likelihood of disaffection among a class so treated, in determining General DeWitt's regulations for exclusion of dangerous people from the war areas bordering the Pacific.

A third distinction, the subject of long and repeated protest from Mongoloid China and Japan, is in the Congressional laws for the exclusion of their nationals from the immigration quotas of the Europeans, the Semitic and part Semitic Western Asiatics, and the Russians of part Mongoloid blood. Neither General DeWitt nor this court is concerned with the political or social justification of this stigma on the Mongolian, but both are concerned with its effect on proud spirited people so branded by the Congress. This court, however, is in a better position than any

[11] California Civil Code § 60; 2 Idaho Gen. Laws Ann. § 31-206; Montana Civil Code § 5702; Arizona Code Ann. (1939) § 63-107

other to know the effect of such facts on the minds of some of the now deported citizens.

A fourth discrimination of race and color is the exclusion of these citizens from many labor unions. Nothing but the stress of war gives the special permits which allow the Chinese to work in some of our war industries. Despite the outstanding mechanical skill of the Mongolian people, the freedom to make a skilled living is denied to the youth taught in our schools to point
83 their hands at the flag which, they are told, promises each of them the dignity of equality of opportunity among his fellows.

One is not here concerned with the vigorous dispute as to the wisdom of such laws, a dispute having on the one hand examples of persons of Europe, the United States and Latin America distinguished in statecraft, the sciences and the arts, who are of Eurasian blood, both immediate of Chinese and Japanese and other Asiatic origin, and more remotely through the American Indian, and on the other the frustrated rejects from the societies of each blood.

Such questions are for the peace table. The case is solely concerned with the question whether such laws and social and industrial regulations have created a real and present danger on the eastern littoral of the Pacific, in a war which the Japanese military caste is waging after, with the aid of assassination, it destroyed an evolving Japanese democracy, having ideals in common with our own.

As a result of these and other discriminations of race and color, the Japanese of our Pacific Coast cities and towns live in segregated quarters. Though compelled to reside there by social rather than governmental force, there are many similarities with the ghettos of Europe—among them the denial of intermarriage, of land owning, and participating in many of the livelihoods of manual skill.

Because of such limitation or social intercourse, people do not become familiar with the Mongolian physiognomy. The uniform yellow skin and, on first impression, a uniformity of facial structure, make "all Chinks and Japs look alike to me," a common colloquialism. Hence arises a difficulty for General DeWitt's soldiers or the federal civil officers in picking out from the other Japanese crowded together in the segregated districts, and including men educated in Japan, the suspected saboteurs or spies or fugitives from a commando landing or hiding parachutists.

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[2] 1913 Cal. Stat., 269, 1 Deering Gen. Laws, Act 261; 5 Oregon Comp. Laws Ann. § 61-102; Washington, Rem. Rev. Stat. § 10582.

[3] People v. Oaki (1930) 286 Pac. 4025; People v. Enfriken (1930) 288 Pac. 788; Takeuchi v. Schmuck (1929) 276 Pac. 345; People v. Nakamura (1932) 13 P. (2d) 805.

Also the difficulty of identification of Japanese of known or suspected enemy aid, by descriptions telegraphed or written to white enforcement officers.

So far as concerns the imminence of danger of Japanese attack on the Pacific Coast, this court would be compelled to find
84 that General DeWitt has a rational ground to except it. It is a fact of general knowledge that in every Japanese air attack on cities and military establishments—among them Chungking, Singapore, Midway, Rangoon, Dutch Harbor, and the British naval station in Ceylon—enough planes passed through the defenses of warned and expectant commanders to cause a conflagration sufficient to destroy the wooden cities of our Pacific Coast.

What is commonly known on the Pacific Coast and not elsewhere, is the fact that, unlike London with hundreds of simultaneous fires in its brick and stone structures and yet no great moving front of conflagration, in wooden-built San Francisco there was a conflagration front of a mile length within five hours of the earthquake of 1906. It was a coalescence of but seven fires. There, luckily, the earthquake placed in on the lee side of the city, but one started by the Japanese on its windward side, in its long maintained northwest trade wind, well could have the bulk of the city in flames in ten hours. The earthquake left the exterior of the city's frame buildings intact, save for some distortions which did not increase the conflagration hazard, but the present developed technique of shattering to pieces several acres of buildings with a single bomb, makes the debris of wooden material mere fuel piles for the succeeding inflammable projectiles. A similar conflagration danger exists in all the Pacific Coast cities. In all of them, General DeWitt well could fear the added menace of the saboteur's torches.

Since the questions certified, in effect, transfer the entire case to the Supreme Court, it is unjust to the appellant to omit from the summary of the contentions on which he relied, his claim of violations of Constitutional provisions other than the due process clause of the Fifth Amendment. He also urged here that such a classification of the Japanese descended citizens from others, in a unitary scheme leading to their imprisonment without a hearing, (1) made General DeWitt's Congressionally authorized regulation a bill of attainder prohibited by Article I of the Constitution; (2) was merely an incident of a single continuing plan to seize his person in violation of the Fourth Amendment, and (3) that the scheme providing for deporting people from their homes to be imprisoned by the Military, without trial, is a cruel and unusual punishment in violation of the Eighth Amendment.

85 It is now nearly ten months since General DeWitt's deportation order was made. The highest court of this great circuit is fully able to decide the submitted questions. Particularly it should not avoid their decision because, as stated in the certificate, they are "difficult" and "this court knows of no decision" for a precedent.[1]

The difference in time between certification and certiorari after our decision, is about four weeks if diligence is used by the Government in filing its sustaining or opposing brief. The time no doubt could be shortened by the agreement of counsel for the appellants seeking the freedom of their clients. Because of this difference in time, certiorari might cause the Supreme Court to reconvene later in June, as it did in the much lesser important cases of Ex parte Richard Quiren and others, argued July 29 and July 30, 1942.

86 Under similar orders all the 70,000 Japanese descended citizens long since have been removed from the Military District No. 1 and now presenting no danger of sabotage or espionage. It is my opinion that a month's delay, coming after the elapse of the ten months in which the order in question has been in existence, does not warrant the avoidance of a decision of this circuit court of appeals on the matters of law and of fact involved in the appeals.

For the above reasons I dissent from the attempt by certification to avoid a decision of the only questions involved in the appeal and, if it is to be avoided, from omitting from the certificate the facts relied upon by Hirabayashi and several of his contentions. It is pertinent that the certificate then voted for and signed by a majority of this court was first seen by me yesterday (March 27th) and after protest ordered sent and sent yesterday

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[1] The certificate's recitals are:

"This cause thus raises novel constitutional questions of great public importance pertaining to an exercise of the war powers to enforce two important regulations which form an important part of the wartime relocation of the Pacific Coast Japanese population. This court is *familiar with the decisions of the Supreme Court* of the United States upholding broad exercises of the war powers of the Federal Government on the one hand, however, *this court knows of no decision* in which citizens residing in areas not subject to martial law have been required by military authorities to observe a curfew and to report to military control stations for exclusion from a military area designated by the military authorities; on the other hand, this Court is sensible of the fact that the military authorities hold the view that military exigencies of modern warfare imperiling the nation and existing on the Pacific Coast at the beginning of the present war were far more grave than any situation hitherto existing in any war with a foreign nation. No doubt because of the military authorities' view of the extreme peril facing the nation this exercise of the war powers of the federal government was employed. The question whether this exercise of the war power can be reconciled with traditional standards of personal liberty and freedom guaranteed by the Constitution *is most difficult*." This Court, *therefore*, pursuant to Judicial Code, Section 239, amended, 28 U. S. C. Sec. 346, certifies to the Supreme Court of the United States the following questions of law concerning which instructions are desired for the proper decision of the cause. [Italics supplied.]

[2] The Supreme Court did not adjourn until June 21, 1943, hence the time factor between certiorari on our decision and certification was negligible. Despite the haste in certification that Court declined to pass on the question of the power to imprison and deport the citizens of Japanese descent. Hirabayashi v. United States, —U. S. —, 87 Law. Ed. 1547, 1548.

by airmail to the Supreme Court. Our rule of practice allows ten days to distribute the dissent for its consideration prior to filing a majority decision, here to certify. Though but two days were requested, after which there is abundant time for the arrival of the certificate and its consideration before the next session of the Supreme Court, this court denied any right to the filing of the dissent before the decision to certify was filed.

March 28, 1943.

WILLIAM DENMAN.
United States Circuit Judge.

[Endorsed: Opinion by Denman, Circuit Judge, on his dissent from the certification of questions to the Supreme Court, and from the omission of facts therefrom. Filed March 28, 1943, as amended by order of September 20, 1943. Paul P. O'Brien, Clerk.]

Concurring opinion.

STEPHENS, C. J., concurring.

It is thought by the majority that the opinion of the Supreme Court in the case of Hirabayashi v. United States, 63 Sup. Ct., 1375 (June 21, 1943), laid down the fundamental principles governing the instant case and that therefore no extended discussion of them is required.

The Hirabayashi case was certified to the Supreme Court of the United States, by this court, after the Attorney General had suggested that such action should be taken, and I entertain
87 no doubt as to the wisdom of this action. That case presented certain war power constitutional questions as to which the welfare of the nation required prompt and final authoritative answers, and while this court had the jurisdiction to decide them, our decision would be the pronouncement of an intermediate court and would not be final. By promptly certifying the case it was made possible for the Supreme Court to settle the important questions during the court's Spring term. The members of this court have never differed as to their decisions in any of the Japanese cases,[1a] but the opinions now being filed reveal that they have never been able to speak in concert as to their reasoning.

In preparing this concurring opinion I am aware that Judge Denman, who does not join in the main expression of the court, concurs only in the result and advances widely different reasoning in his concurrence. To his concurring opinion he annexes an opinion which he filed in his opposition to the certification of the

[1a] The group of cases before this court arising out of military orders are sometimes referred to as the "Japanese cases." They include Gordon Kiyoshi Hirabayashi v. United States, — U. S. — (June 21, 1943); Minoru Yasui v. United States, — U. S. — (June 21, 1943); and Fred Toyosaburo Korematsu v. United States, — U. S. — (June 1, 1945).

Hirabayashi case.[16] It is apparent that the broad issues of the latter case are present here. This opinion does not respond to Judge Denman's concurring opinion in this case, but does notice material contained in the Hirabayashi dissenting opinion.

Appellant relies heavily upon Sterling v. Constantine, 287 U. S. 378, a case in which the subject of state martial law and the jurisdiction of federal courts in regard thereto is treated.

It is noteworthy that the Supreme Court in the Hirabayashi case did not mention the Sterling case, and this fact makes it quite conclusive that the supreme judicial body of the nation regarded the law applicable to a local disturbance as having little analogy to the legal power of our government to resist an attempt to subject it and the American people to a foreign will. This, in my opinion, is one of the cardinal errors of the appellant's case as it has been presented to us. One paragraph of the Su-
88 preme Court's main opinion in the Hirabayashi case is sufficient to guide us as to the extent of the war powers of the President and the Congress and is sufficient to inform us that we are not to sit in judgment over the wisdom of actions taken under such powers.

We quote from the main opinion: "Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Ex parte Quirin, supra, 28–29; cf. Prize Cases, supra, 670; Martin v. Mott, 12 Wheat. 19, 29. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."

At this point it would perhaps be well to note that the legality of restraining Japanese aliens or American citizens of Japanese ancestry to War Relocation Centers is not in this case nor was this question involved in the Hirabayashi case. The actions of General DeWitt,[17] considered in this case, were under the authority of Congressional Acts and Executive Orders and were taken as steps to control the appellant and others preparatory to

[16] This opinion was filed March 28, 1943, and was amended September 20, 1943. Although appearing in our advance sheets and published in various law journals and widely circulated, this opinion has not been published in the official federal reporter.

[17] Lieutenant General John L. DeWitt, Commanding General, Western Defense Command and Fourth Army during the period herein considered.

their removal from the military zone in which they found themselves.

Appellant had resisted the government's right to take this war move so far as his person was concerned, and he was arrested and convicted of violating the order. We are asked, in effect, to annul the conviction by deciding that in our judgment the defensive strategy of the General in charge was not justified by the facts and therefore was illegal and unconstitutional.[18] The ap-
89 peal indicates a lack of understanding of the comparative rights of individuals in times of peace and in times of war. The great and far reaching power necessary to the prosecution of war, of course, disturbs the ordinary habits and customs of the civilian. It always has done so, but modern war has brought home to us a clearer realization that civilians as well as the armed forces are under the compulsion of acting in cooperation with military necessity. The duty of making final decisions in the prosecution of war must be placed somewhere and the Constitution places this duty with the Congress and the President. How weak indeed our country would be in the kind of world in which we live, if before their validity could be regarded as certain, war strategy orders would have to be ratified and validated by the courts after a trial of fact as to their necessities. The President may not declare war, Congress does that, but the President is the Commander-in-Chief. His, as Mr. Chief Justice Hughes has said, is the duty not only to wage war but to wage war successfully. The border line of that power has never been defined. It is the genius of our representative government that as great a part of war action as is possible shall be under Congressional enactment and every President in every war we have ever prosecuted has adhered to this principle. The Congress controls the purse strings and this alone is sufficient to make cooperation between the executive and the legislative authorities absolutely necessary. It has been adhered to in the action taken upon which this case is brought. There is no sanction in our governmental scheme for the courts to assume an over-all wisdom and superior virtue and take unto themselves the power to vise the Acts of Congress and the President upon war matters so long as such acts are not in conflict with provisions of the Constitution itself. It is idle to go further and speculate as to what would or should happen in instances where courts and the other two branches of the government were immovably aligned against each other.[19] Any such

[18] Disobedience to the General's orders is made an offense triable and punishable under civil court jurisdiction. The punishment dealt out is not claimed to be cruel and criminal and for that reason unconstitutional. As a matter of fact appellant was placed under a six months probationary sentence.

[19] There have been a few instances in which conflict between the military and the courts have occurred. No satisfactory solution to this impasse has been worked out. Good sense has come to the rescue in most instances and peace has come without victory to either side. The American people do not take kindly to military government, and public sentiment remains the driving force that compels its limitations.

situation would mean the failure of the government structure itself.

90 A large part of our Pacific-Ocean Navy had been wrecked in a peace time treacherous raid by Japan and America had declared war almost immediately. The General charged with the defense of the Western mainland proceeded under Congressional Acts and Executive orders to control the movement of enemy nationals and American-born of enemy ancestry preparatory to their removal from the coastal zone. Appellant resisted the military orders designed to accomplish these ends.

It seems to me that the situation as we now see it absolutely negatives the idea that the District Court had or the Circuit Court has any jurisdiction to pass upon the issue of necessity for the war action taken. To me it is quite preposterous that either of the courts mentioned should assume the legal power to require a showing in a public trial as to whether or not those ordered excluded from the zone included fifth columnists, enemy informers or saboteurs.*

However, Judge Denman opposing the certification of the Hirabayashi case to the Supreme Court states in his dissenting opinion that this court, which is made up of men long residing in or near the Pacific slope and who have come in contact with Japanese is therefore especially qualified to know and understand whether or not there was in fact a good military reason for the actions questioned in this case.

If I understand the views expressed in the dissenting opinion in the Hirabayashi case, it is that the district court should try the legality of General DeWitt's orders upon evidence of their necessity whether the evidence consist of testimony or judicial notice or both and that this court should review the judgment of the district court upon the evidence taken and upon the several judges' personal knowledge of the Japanese people. Thus, if after a trial of the facts it should be found that the general issuing the order had good cause for thinking that the people who were ordered excluded from the coastal zone might cause trouble, these courts should hold the order legal, otherwise they should

91 nullify it. Upon this premise restrictions upon the activities of Japanese in the Pacific Coast states both legal and social are judicially noticed in the dissenting opinion as likely to produce anti-American or pro-Japanese acts in resentment and these facts therefore constitute evidence supporting the order. As tending to establish the contrary the author of the dissenting

* I do not regard the ordering of appellant to remain in a given place or to stay in a given place in order to be later evacuated from the zone as a part of subsequent incarceration after he has been evacuated. It is refreshing to note that not one so evacuated and thereafter confined in an assembly center or war relocation center has prosecuted a petition for a writ of habeas corpus to decision.

opinion cites a statement of government counsel made in response to a question propounded to him from the bench by Judge Denman that no indictment or information charging espionage, sabotage or treasonable act has been filed against those subject to the questioned orders.[21] I am in total disagreement with this theory:

I feel impelled to comment upon Commodore Perry's expedition to the Liu Chiu and Japanese Islands in 1853,[22] because it has been misdescribed as an act of aggression from which Pearl Harbor and a Japanese hatred would more or less naturally flow. It is sufficient, of course, for the purposes of this case that war existed between the United States and Japan when General DeWitt issued the orders here questioned and that a powerful attempt to invade the west coast seemed imminent. It could not be doubted that aid would be afforded the invading forces by Japanese nationals and some sympathizing citizens of Japanese ancestry.

However, it is historically incorrect to assume that the necessity for the military control of resident Japanese-blooded people is the visitation of our father's sins upon us.

Commodore Perry with his small American fleet was not bent upon a blustering imperialistic invading expedition when he went into Japan. The Russian, Portuguese, English, and Dutch had been there long before under the most limited and humiliating restrictions. We had great need for a station westerly of Honolulu wherein our ships of commerce (by this time steamships as well as clippers) could "be supplied with wood, water, provisions, and coal and other articles their necessities may require * * *." (Article II of the treaty negotiated by Commodore Perry.) The sailors of our merchant marine had been cruelly treated and murdered when they scrambled upon Japanese rocks from their storm wrecked vessels. There was no consular or ambassadorial officer through which we could officially express our needs, and there was no working mode of communication through which our protests could be conveyed. The expedition was officially dispatched by the President of the United States under the most careful instructions to communicate our needs and register our protests to the Government of Japan through tact and consideration.[23]

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[21] During this period there were numerous accounts in the press of the discovery of short wave radios, cameras, and arms found in the possession of Pacific Coast Japanese long after they had been ordered to turn them in to the military authorities. And any student of Japanese officials' conduct knows them to be the equal of any in the fine art of espionage and knows that they excel in practice of deception behind the mask of gracious politeness.

[22] Dennett, Tyler, "Americans in Eastern Asia." The Macmillan Co., N. Y., 1922. Barrows, Edward M., "The Great Commodore." The Bobbs-Merrill Co., N. Y., 1935. Treat, Payson J., "Diplomatic Relations Between the United States and Japan, 1853-1895," vol. I, Stanford University Press, 1932.

[23] For text of treaty, see Perry's "Narrative of the Expedition of an American Squadron to the China Seas and Japan," page 440, et seq.

A very interesting, short account of Perry's expedition, its purposes and accomplishments is contained in Ambassador Joseph C. Grew's book, entitled "Report from Tokyo." I quote from it in the margin.[24]

93 Upon Commodore Perry's return he made an exhaustive, thoroughly documented official report of his expedition to his government, entitled "Narrative of the Expedition of an American Squadron to the China Seas and Japan." At page 108 of this Narrative, the text of Secretary of State Edward Everett's supplemental instructions to Perry is printed, and I briefly quote therefrom. (The original instructions had been drawn by Secretary of State Daniel Webster, predecessor in office of Mr. Everett.) "The President concurs * * * that you should secure one or more ports of refuge of easy access. If you find that these cannot be obtained in the Japanese islands without resort to force, it will be necessary that you should seek them else-
94 where. * * * In establishing yourself at one or two convenient points * * *, with the consent of the na-

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[24] "It is necessary that we now assess, coolly and impassively, the events of the past ninety years in the Pacific—the ninety years that have elapsed since Commodore Perry concluded with Japan the treaty that opened the way for the subsequent admission of Japan into the family of nations.

"We are today being given dreadful evidence that the process of Japan's emergence from three centuries of isolation and of her assimilation into the family of nations is far from complete. Except for brief contacts at widely spaced intervals * * * Japan had * * * been in virtual isolation since the very beginning of her history. * * * Her polity, then as now, was tribal in character. As a nation, the Japanese possessed the virtues of a tribal community: homogeneity and subordination of the individual to the community; but they also possessed the defects and weaknesses of a primitive community; they revered the tribal sanctions and feared change. * * * Although the American Government was cognizant of the trend * * * its purpose in sending Commodore Perry to Japan in 1853 was primarily to ameliorate conditions which grew out of the growing commerce of the United States with China and the presence of a large number of American whaling ships off the coast of Japan. The advent in the China trade of steamships, with their limited capacity to carry coal, created insistent need for at least one coaling station intermediate between the Pacific coast of America and China. Further, American vessels had been shipwrecked in Japanese waters, and American seamen * * * had been treated with inconceivable brutality. A third consideration was the need for establishing depots in Japan from which American whaling ships could restock themselves. * * *

"After incredible obstacles and difficulties, Commodore Perry succeeded on March 31, 1854, in concluding with the Japanese a treaty which, although limited in scope, met the immediate needs of the moment. However, it contained one feature the importance of which the Japanese had not foreseen, and that was the assent of the Japanese to the stationing in Japan of an American consular officer. It was in the exercise of that treaty provision that the United States dispatched to Japan in 1856 its first diplomatic representative, Townsend Harris.

"The selection of Harris * * * was an extraordinarily happy one. He had * * * acquired a familiar knowledge of Japan * * * of government, of their customs, and of their characteristics, and he had dedicated himself to the task of helping the Japanese to prevent the extension to Japan of exploitative practices pursued by the white man in his dealings with the backward peoples of the East * * *. So long as Japan remained in seclusion * * * she was not entitled to the privileges which membership in the family of nations would confer; and it was Harris' aim to induct Japan into the family of nations under the most favorable auspices. He prepared and, after intolerable delays and indignities imposed upon him by the Japanese, presented to the Japanese Government a Treaty of Commerce and Navigation of the most liberal character possible * * *. It took Harris two years of patient and tactful negotiation before his treaty was signed. But this American did far more than negotiate a treaty. He educated the Japanese officials in the ways of diplomacy, international law, economics, and commerce. He provided Japan with the information which she needed to merge into the world * * *. A Japanese, Dr. Inazo Nitobe, wrote of him, 'A man of stern rectitude and gentlest powers of persuasion, he, indeed, more than any other, deserves the epithet of benefactor. Because in all his dealings with us, the weaker party, he never took advantage of our ignorance, but formulated a treaty with the strictest sense of justice * * *.

tives, you will yourself pursue the most friendly and conciliatory course * * *. Take no supplies from them except by fair purchase, for a satisfactory consideration. * * * Make no use of force, except in the last resort for defense, if attacked, and self-preservation."

If Perry was ready for eventualities when his vessels poked their way into the land-locked harbor of Yeddo,[25] he was only being cautious in the light of history and living up to the traditions of our navy. An American vessel some years before had been fired upon when the Japanese learned that it had been disarmed by its skipper as proof of its peaceful intentions. Officers and men of the United States Gunboat "Preble" had had great difficulty in rescuing nineteen men who had been shipwrecked and had been held in prison for eighteen months by the Japanese Government.[26] What Perry[27] did and how he and his men conducted themselves after they entered the Japanese harbor have their great importance. No shot was fired, and he markedly succeeded in his mission after long and practically inexhaustible patience.

Any well-informed Japanese knows that Perry's expedition with the American nation behind it saved Japan from being cruelly invaded by power- and commerce-hungry nations in the grand day of imperial conquests.

In my opinion the considerations upon which General DeWitt acted under the war statutes which an informed Congress had recently enacted and the President had approved were much more fundamental than the necessity for a defense against a Japanese retaliation for the Perry incident and were much more fundamental than any legal restrictions and social discriminations visited upon Japanese nationals residing in the United States or to a lesser extent social limitations suffered by American citizens of Japanese descent.

General DeWitt's orders were issued in the light of a knowledge of Japan bent upon accomplishing a Gargantuan racial dream of "Hakka Ichi U," the eight corners of the earth under the Japa-

[25] See Chapter XV Barrows "Great Commodore." The Japanese had been informed of Perry's coming as Japanese boats brought the news to them from Shuri, the capital of the Islands of Liu Chiu where Perry had anchored for some time.

[26] See Perry's "Narrative," page 60, for account of a Japanese attack upon the United States Steamer "Morrison," its officers and men, when it sailed into a Japanese harbor with guns removed, upon a mission of amity and mercy to return Japanese nationals who had been shipwrecked upon our Pacific shores, and Dennett, "Americans in Eastern Asia," page 246. See also experience of United States Gunboat "Preble," in the "Narrative."

[27] Mathew Calbraith Perry was a midshipman at fourteen, served with distinction in the war of 1812, and in the war with Mexico. His brother was Oliver Hazard Perry of Lake Erie fame. "Commodore Perry ranks as one of the great figures of our Navy's glorious history. As a diplomat he ranks among the great of that calling."

nese roof, or supremacy over all peoples.[7] [8] This fatal ideology has driven powerful nations throughout history to commit unmeasured and unnumbered crimes only to sink into dishonor and impotence. Our military command knew of the monstrous practices of the Japanese in occupied China and it knew of the especial danger from the ranks of the Kibei[9] upon our western coast.

There are many loyal American citizens of Japanese descent who are bearing their burden uncomplainingly—a burden 96 heavy enough, it is true, but light indeed compared with that of other thousands.

[Filed endorsement omitted.]

97 In United States Circuit Court of Appeals for the Ninth Circuit

No. 10248

FRED TOYOSABURO KOREMATSU, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Judgment

Filed and entered Dec. 2, 1943

Upon appeal from the District Court of the United States for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Southern Division and was duly submitted.

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[7] See "How Japan Plans to Win," Kinosaki Matsuo (Translation) Little, Brown & Co., Boston, 1942.

See General Araki in a widely circulated pamphlet setting out Japan's national policy, published in 1933 in Ta Kung Pao.

[8] The following taken from Vol. III, No. 12 (Nov. 1, 1943), Contemporary China, condenses the Japanese conception of their Mikado and his place in the government as follows:

"1. He is a divine person, descended from a goddess, and therefore not subject to any human laws.

"2. He is so aloof from mundane affairs that he does not take direct part even in the business of governing his own country.

"3. He acts only on the advice of his ministers and is therefore not responsible for anything done in his name.

"4. He occupies a throne which is established forever, and continues a line of rulers unbroken for ages eternal.

"5. He is destined to be the ruler of all nations, when all peoples from the eight corners of the world will be brought under one roof.

"6. Any war fought in his name is a holy war, and anyone who is killed while fighting his war becomes immortalized as a god in the Shinto pantheon."

[9] Kibei: American born of Japanese descent who have been sent to Japan in their early youth for indoctrination in Japanese customs and religions and governmental beliefs and have then been returned to the United States.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[File endorsement omitted.]

98 In United States Circuit Court of Appeals for the Ninth Circuit

Order denying petition for rehearing

Jan. 7, 1944

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed December 31, 1943, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

It is further ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including February 7, 1944, and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

99 [Clerk's certificate to foregoing transcript omitted in printing.]

100 Supreme Court of the United States

Order granting motion for leave to proceed in forma pauperis

March 27, 1944

On consideration of the motion for leave to proceed herein in *forma pauperis*,

It is ordered by this Court that the said motion be, and the same is hereby granted.

101 Supreme Court of the United States

Order allowing certiorari

(Filed March 27, 1944)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] In forma pauperis. File No. 48172. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 679. Fred Toyosaburo Korematsu, petitioner *vs.* The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed February 8, 1944. Term No. 679 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE 1944

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No. [redacted] 22

FRED TOYOSABURO KOREMATSU,
Petitioner (Appellant Below),
vs.
UNITED STATES OF AMERICA,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

JACKSON H. RALSTON,
Mills Tower, San Francisco 4, California,
Attorney for Petitioner.

WAYNE M. COLLINS,
Mills Tower, San Francisco 4, California,
Of Counsel.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

No.

FRED TOYOSABURO KOREMATSU,
Petitioner (Appellant Below),

vs.

UNITED STATES OF AMERICA,
Respondent (Appellee Below).

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Fred Toyosaburo Korematsu petitions that a writ of *certiorari* issue to review a judgment entered against him on December 2, 1943, by the United States Circuit Court of Appeals for the Ninth Circuit in a cause pending in that Court numbered and entitled.

"No. 10248, Fred Toyosaburo Korematsu, Appellant, vs. United States of America, Appellee". (R. 97.) The said judgment (R. 97) and opinion (R. 57 to 96), reported in 138 Fed. (2d) ....., affirms a judgment of conviction and five-year probationary sentence (R. 25) imposed upon the petitioner on September 8, 1942, by the U.S. District Court for the Northern District of California, Southern Division, for the commission of a misdemeanor, to-wit, a violation of Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, H.R. 6758, approved March 21, 1942, 56 Stat. 173, which is now codified as Title 18 USCA, Sec. 97a, and set out at page i in the Appendix to brief herein. The said Circuit Court of Appeals denied petitioner's petition for a rehearing of the cause on January 7, 1944. (R. 98.)

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

On July 12, 1942, an information (R. 1) was filed in the Southern Division of the United States District Court for the Northern District of California, charging petitioner with the commission of a misdemeanor, to-wit, a violation of Public Law No. 503, which is now codified as Title 18, USCA, Sec. 97a, and is set out at page i of the Appendix herein. The gist of the charge was that the petitioner, a native-born American citizen of Japanese ancestry and a resident of Alameda County, California, on May 30, 1942, knowingly and wilfully remained within the geographical limits of Military Area No. 1

prescribed in Public Proclamation No. 1, under ostensible authority of Executive Order No. 9066, by J. L. DeWitt, Commanding General, Western Defense Command and Fourth Army, and particularly in that portion thereof described in Civilian Exclusion Order No. 34 issued by said General on May 3, 1942, from which said areas he had been ordered excluded, and imprisoned in an assembly center, and was destined to be evacuated therefrom and interned in a concentration camp by said General simply because he was an American citizen of Japanese ancestry and for no other reason whatsoever.

Prior to his arraignment in said District Court the petitioner interposed a demurrer (R. 3) and a supplemental demurrer (R. 22) to said information which were briefed and argued and later overruled. (R. 24.) Thereafter, petitioner was arraigned, entered a plea of not guilty, waived a jury (R. 31), and the cause proceeded to trial before said District Court. During the progress of the trial the petitioner made oral motions for a dismissal of the information and the discharge of the petitioner from custody at the close of the government's examination in chief (R. 38) and at the close of his defense (R. 41) and a motion for arrest of judgment after he had been pronounced guilty by the District Court of the charge preferred against him. (R. 42.) Each of said motions was based upon, reiterated and incorporated each and all of the grounds and reasons set forth in the said demurrer and supplemental demurrer to the information asserting the invalidity and unconstitutionality of the said statute, Executive Order No. 9066, Public

Proclamations Nos. 1, 2, 3 and 4, and Civilian Exclusion Order No. 34 on their faces and as applied to petitioner. Each of said motions was denied by the trial judge and exceptions thereto were properly and timely taken by petitioner and noted by that Court. The trial Court thereafter adjudged petitioner guilty of a violation of the statute as charged in the information and sentenced him to probation for a period of five years. (R. 25, 42.)

Thereafter the petitioner appealed from the said judgment of conviction and probationary sentence to the United States Circuit Court of Appeals for the Ninth Circuit, raising anew the invalidity of said statute, proclamations and civilian exclusion order upon each and all of the grounds therefor originally set forth in his demurrer and supplemental demurrer to the information interposed in the trial Court. While said appeal was pending the appellee, respondent herein, moved to dismiss the appeal on the ground that the probationary sentence was not a final order from which an appeal would lie. After the arguments on said motion and on the merits of the cause and the issues it presented had been concluded the cause was submitted for decision to said Court sitting *in banc*. Owing to a diversity of opinion among the Justices of the Circuit Court of Appeals, said Court pursuant to the provisions of Sec. 239 of the Judicial Code, as amended, 28 USCA Sec. 346, certified to this Court the question whether or not it had jurisdiction to entertain the appeal. This Court, on June 1, 1943, answered the question in the affirmative. *Korematsu v. United States*, 319 U.S. 433, 87 L. Ed.

1086. Thereafter, on December 2, 1943, said Circuit Court of Appeals rendered its judgment (R. 97) and filed its opinion together with the opinion of Denman, C.J., concurring in the result but dissenting from the grounds of the majority opinion, and the concurring opinion of Stephen, C.J., which dismissed the motion to dismiss the appeal and affirmed the judgment of the trial Court. (R. 57-96.) Your petitioner seeks a review of said judgment affirming the conviction and probationary sentence imposed upon petitioner by the trial Court.

STATEMENT DISCLOSING BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

The Supreme Court of the United States has jurisdiction to review the judgment in question by virtue of the provisions of Sec. 240(a) of the Judicial Code, as amended (28 USCA, Sec. 347(a)).

Public Law No. 503, under which the petitioner was convicted and sentenced to probation in the District Court for disobeying the provisions of Civilian Exclusion Order No. 34 issued by General DeWitt, provides that any person violating the provisions of military orders in prescribed military areas shall be guilty of a misdemeanor and subject to a fine not exceeding $5000 and imprisonment for not more than one year, or both. In the District Court and in the Circuit Court of Appeals there was drawn into issue the validity of said statute, exclusion order and other military orders which destined the petitioner to

evacuation from the prescribed military areas and eventual internment in a War Relocation Center. The petitioner contended therein and contends herein that said statute and military orders he was charged with violating were unconstitutional and void as being repugnant to the provisions of the 4th, 5th, 6th, 8th and 13th Amendments and to Secs. 1 and 9, cl. 3 of Art. I, Secs. 1 and 3 of Art. III and Sec. 2, cl. 1 of Art. IV of the Constitution, but his contentions were resolved against him in both Courts. The judgment of said Circuit Court affirming the judgment of the said District Court herein is both final in form and in substance and disposed of all the elements of the controversy in the trial Court. Said judgment affirms the legality of the conviction of the petitioner and his sentence to probation and therein holds valid the aforesaid military orders in their entirety as construed and as applied to him. The issues presented herein are substantial federal questions and have not heretofore been specifically passed upon by this Court.

QUESTIONS PRESENTED.

The review sought herein presents the following questions:

(1) Is the statute as applied to petitioner void for containing an unconstitutional delegation of *unlimited legislative power* to Courts and juries to determine what acts shall be criminal and punishable thereunder in violation of Sec. 1 of Art. I of the Constitution?

(2) Is the statute applied as the enforcement machinery for military orders void for containing, in violation of Sec. 1 of Art. III of the Constitution, an unlawful delegation of *unlimited judicial power* to the military commander to function in lieu of the Courts by enabling him to hold, in the recesses of his own mind, a mock trial of civilians and to condemn them to deportation and imprisonment on mere suspicion or hearsay or because of a prejudice he harbors in his own mind against them because of their Japanese ancestry?

(3) In being utilized as the enforcement procedure for *lettres de cachet* which discriminate against the petitioner and thousands of other citizens, simply because of the nationality of their forbears, is the statute, as applied, unconstitutional and void upon the following grounds: (a) as depriving him of his liberty and of his property without due process of law, guaranteed to him by the 5th Amendment; (b) as taking his private property, under an asserted claim the taking is for a public use, without just compensation in violation of the 5th Amendment; (c) as an abridgment of his fundamental *privileges and immunities* of national and state citizenship guaranteed by the 5th Amendment and Art. IV, Sec. 2, cl. 1 of the Constitution; (d) as a *bill of attainder* forbidden by Art. I, Sec. 9, cl. 3 of the Constitution; (e) as an *infamous punishment* forbidden by the 5th Amendment; (f) as a *cruel and unusual punishment* in violation of the 8th Amendment; (g) as imposing upon him a degrading *condition of slavery and in-*

voluntary servitude forbidden by the 13th Amendment; (h) as infringing his right to be secure in his person, house, papers and effects against *unreasonable searches and seizures* in violation of the 4th Amendment; (i) as subjecting him to internment without an accusation of crime being lodged against him and without affording him a judicial trial or an administrative hearing and the incidents thereof in violation of the 5th and 6th Amendments; and (j) as working a corruption of blood and forfeiture, without trial, upon the theory of the constructive treason of petitioner's remote ancestors in violation of Sec. 3 of Art. III of the Constitution?

(4) In the absence of martial law and rule can the constitutional rights and liberties of the petitioner as a loyal citizen be curtailed by a military commander and this caprice be justified as a proper exercise of war power by a mere recital in his proclamations of the existence of a military necessity when the recital had no rational basis in fact and when not a scintilla of evidence tending to prove the military action taken was conceived in good faith, in the face of an emergency and was directly related to the quelling or prevention of any disorder or threatened crime in which the petitioner had a part was introduced into evidence by the prosecution at the trial below to sustain its burden of proof?

(5) Can the Courts take judicial notice or assume judicial knowledge of highly dubious facts in order to support a finding of the existence of a military necessity justifying an abridgment of fundamental

constitutional rights where a rational basis therefor did not in fact exist and the military commander's action was based upon mere suspicion or hearsay or arose out of his personal prejudice?

(6) If the military commander can do these things with impunity, not by virtue of right but by reason of a usurpation of power, the question remains, can the Courts brand the petitioner a criminal and punish him for resisting these destructive orders, or is it the duty of the Courts to preserve his constitutional rights regardless of what the military commander does to him?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the Ninth Circuit has decided several federal questions of national importance which heretofore have not been, but should be, settled by this Court. Its decision upholds the application of the provisions of Civilian Exclusion Order No. 34 to the appellant and the validity of Public Law No. 503 as its enforcement machinery. Thereby it holds valid the whole racial discrimination program of General DeWitt under which the petitioner and approximately 70,000 citizens of Japanese ancestry resident in the Western States were arrested by the military authorities, were confined to stockades designated Assembly Centers and were thereafter imprisoned in concentration camps designated Relocation Centers where the greater number of them are held

in servitude at his caprice until he or a higher governmental authority sees fit to release them. The majority opinion, while recognizing that this Court, in *Hirabayashi v. U.S.*, 320 U.S. 81, 87 L. Ed. 1337, "did not expressly pass upon the validity of the evacuation order" of the military commander nevertheless concluded that the principle established therein was determinative of this issue. It disposed of the petitioner's major contentions without discussion. See concurring opinion of Denman, C. J., criticising this summary disposition of these contentions "without their mention, much less their consideration". (R. 61.) In the *Hirabayashi* case this Court refused to pass upon the precise question of the validity of an exclusion order which had been certified to it for answer because the conviction was held sustainable under a second count in an indictment for a violation of a curfew order. Consequently, the question of the validity of the civilian exclusion order and the whole banishment and imprisonment program of General DeWitt involved herein and the statute as its enforcement procedure have never been passed upon by this Court.

2. The Circuit Court's decision assumes that the questions concerning the authority of the Executive and his subordinate military commander to order this compulsory evacuation and internment of the petitioner and similarly injured citizens was authorized by Congress and that this point had been determined in the *Hirabayashi* case. However, this Court, in the *Hirabayashi* case left undecided the question whether

Congress had authorized or was empowered to authorize these evacuation and imprisonment orders. It neither assumed nor made a finding of fact supporting a reasonable basis for the application of such orders. It restricted its decision to a justification of the statute as the enforcement machinery for a trifling curfew order which it declared had been authorized by Congress and the Executive. It is also of importance to note that the Circuit Court failed to pass upon the specific question whether or not the evacuation program of the military commander was authorized or sanctioned by the President's Executive Order No. 9066. Neither of these questions has heretofore been decided by this Court. They would appear to be substantial federal questions requiring final settlement in order that the division line between military authority and civilian right in time of war be clearly delineated.

3. The opinion of the Circuit Court appears to be at variance and in direct conflict with decisions of certain District Courts upon the precise questions herein presented. In *Schueller v. Drum* (Dist. Ct. Pa. decided 8/20/43), 51 Fed. Sup. 383, and in *Ebel v. Drum* (Dist. Ct. Mass. decided 9/20/43), 52 Fed. Sup. 189, decided since this Court rendered its opinion in the *Hirabayashi* case, individual civilian exclusion orders issued by a military commander in the Eastern Defense Command were held to want validity on the ground that at the time of their application there was not present a reasonable and substantial basis for the judgment the military authorities made that the threat of espionage and sabotage to our military re-

sources was real and imminent. Inasmuch as decisions of Circuit Courts appear to possess only persuasive weight outside their own judicial districts in the absence of a final opinion on the issues by this Court a review herein would seem to be necessary to bring final order out of the reigning confusion.

4. The Circuit Court's opinion appears also to have decided, either expressly or by silence, each of the questions propounded and urged by the petitioner in a way probably in conflict with applicable decisions of this Court. It appears to have ignored the application of the principles established in *Ex parte Milligan*, 4 Wall. (U.S.) 2, to the issues herein, to have rejected the rules testing the limits of military authority which were laid down in *Sterling v. Constantin*, 287 U.S. 378, and to have failed to apply the rules relating to a delegation by Congress of a limited discretionary power to executive officers enunciated in *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495. In addition, it appears that the Circuit Court failed to consider that the action of the military commander taken herein did not conform to any standard approved by Congress and that his orders arresting, banishing and imprisoning the petitioner were not supported by findings showing they so conformed. In consequence these orders violated the rules of the *Schechter* case and the rules reiterated in the *Hirabayashi* case. Attention is also drawn to the fact that Executive Order No. 9066 authorizes the transportation and accommodation of persons from excluded areas but confers no power upon a military commander to imprison them, conse-

quently, the banishment and imprisonment of petitioner was not authorized by the President. This point was a major contention of the petitioner but was either ignored by the Circuit Court or was decided adversely to him *sub silentio*.

PRAYER FOR THE ISSUANCE OF THE WRIT.

Wherefore, the petitioner prays that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court, "No. 10,248, Fred Toyosaburo Korematsu, Appellant, vs. United States of America, Appellee", to the ends that said cause may be reviewed by this Court as provided by law, that said judgment of said Circuit Court of Appeals be reversed and that your petitioner have such other and further relief in the premises as may seem just.

Dated, San Francisco, California,
February 2, 1944.

JACKSON H. RALSTON,
Attorney for Petitioner.

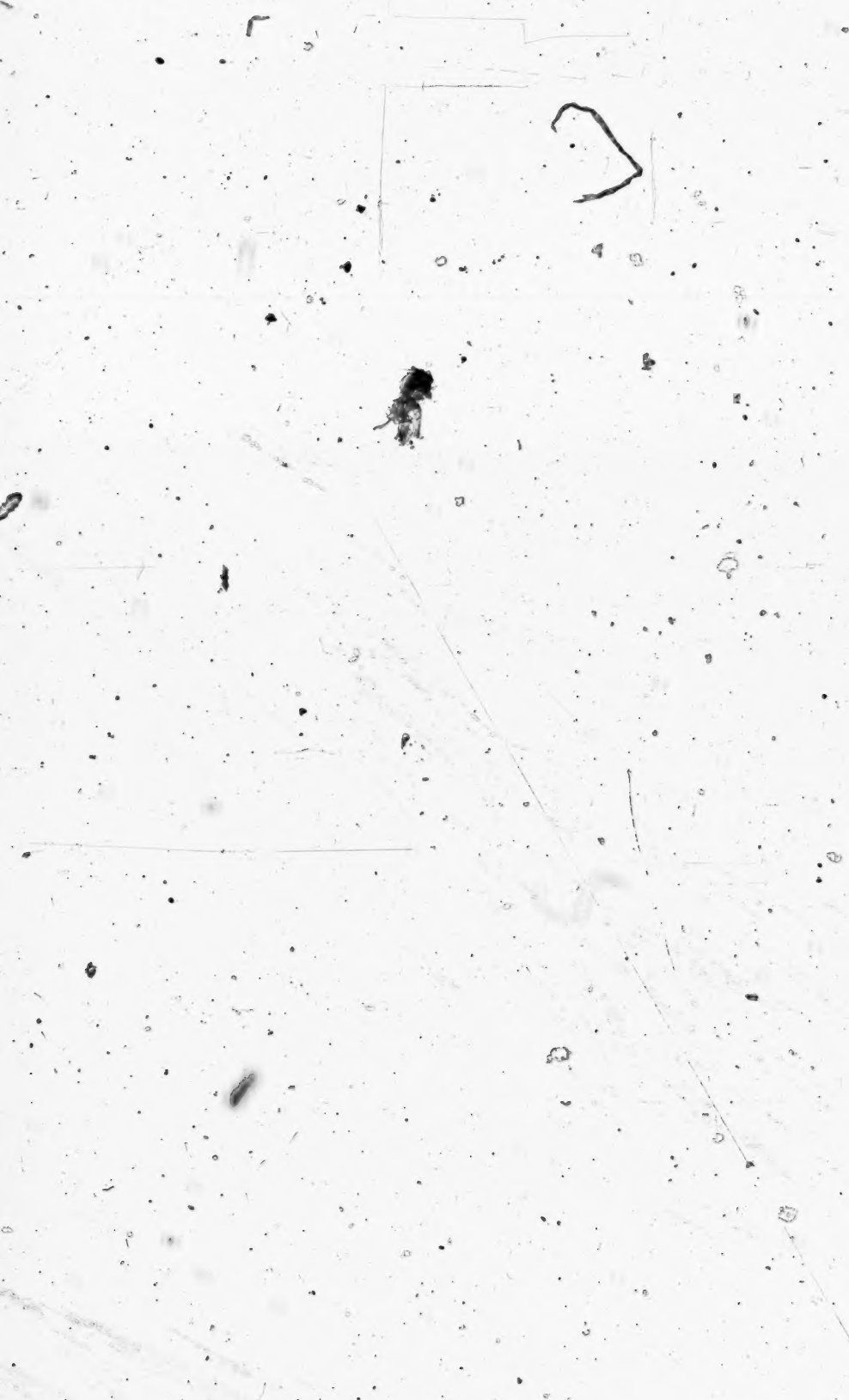
WAYNE M. COLLINS,
Of Counsel.

CERTIFICATE OF COUNSEL.

The foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith, and is not interposed for delay.

Dated, San Francisco, California,
February 2, 1944.

JACKSON H. RALSTON,
Attorney for Petitioner.



In the Supreme Court
OF THE
United States

OCTOBER TERM, 1943

No.

FRED TOYOSABURO KOREMATSU,
Petitioner (Appellant Below),

vs.

UNITED STATES OF AMERICA,
Respondent (Appellee Below).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

JURISDICTION.

A. Dates of entry of judgments of District and Circuit Courts.

(1) The judgment of conviction and probationary sentence was entered in the District Court on September 8, 1942. (R. 25, 26.).

(2) The judgment (R. 97) and opinion (R. 57-97) of the Circuit Court of Appeals for the Ninth Circuit affirming the judgment of the District Court were

rendered, filed and entered on December 2, 1943, and said opinion is reported in 138 Fed. (2d) .....

(3) The petitioner's petition for a rehearing of his cause was filed in the Circuit Court of Appeals on December 31, 1943, and was denied by an order of said Court entered on January 7, 1944, said order staying the issuance of its mandate until February 8, 1944, pending the docketing of his petition for a writ of certiorari in the United States Supreme Court and thereafter until this Court passes thereon. (R. 98.)

B. Statute under which jurisdiction is invoked.

The jurisdiction of the Supreme Court of the United States is invoked herein by virtue of the provisions of Section 240 (a) of the Judicial Code, as amended. (Title 28 USCA, Sec. 347, subd. (a).)

C. Statement of grounds on which the jurisdiction of the Supreme Court is invoked.

In the District Court and the Circuit Court of Appeals, as in this petition, there was drawn into issue by the petitioner the validity of Public Law No. 503 (18 USCA, Sec. 97a), Public Proclamations Nos. 1, 2, 3 and 4, Civilian Exclusion Order No. 34 and subsequently issued imprisoning orders of General DeWitt on the ground that said statute in being applied to the petitioner as the enforcement procedure for said military orders was void as being repugnant to the provisions of the 4th, 5th, 6th, 8th and 13th Amendments and to Secs. 1 and 9, cl. 3 of Art. I, Secs. 1 and 3 of Art. III, and Sec. 2, cl. 1 of Art. IV of the U.S. Constitution. Petitioner's chief contentions so drawn

into issue were and are that said statute and orders as applied to him unconstitutionally deprived him of substantially all his rights of national citizenship in the absence of crime upon his part without due process of law, constitute a bill of attainder and effectually imprison and detain him in involuntary servitude. The decision of the Circuit Court affirming the judgment of the District Court upheld the validity of the statute and the military orders in their entirety, summarily disposing of petitioner's major contentions under the mistaken impression that the issues involved herein had been determined in *Hirabayashi v. U.S.*, 87 L. Ed. 1337. The questions involved herein, however, have not heretofore specifically been passed upon by this Court. They appear to be substantial federal questions requiring final settlement by this Court.

D. Cases believed to sustain the jurisdiction.

The following cases are believed to sustain the jurisdiction of the Supreme Court:

Hirabayashi v. U.S., 87 L. Ed. 1337;
Ex parte Milligan, 4 Wall. (U.S.) 2;
Sterling v. Constantin, 287 U.S. 378;
Schechter Poultry Corp. v. U.S., 295 U.S. 495;
Truax v. Raich, 239 U.S. 33, 38;
U.S. v. L. Cohen Grocery Co., 255 U.S. 81.

II.

STATUTE, EXECUTIVE ORDER AND MILITARY ORDERS THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED HEREIN.

(See Appendix to this Brief.)

III.

STATEMENT OF FACTS.

The appellant is an adult native born male citizen of the United States who was born on January 30, 1919, in Oakland, Alameda County, California, of parents who resided therein and were nationals of Japan. (R. 32, 39.) He was reared in Oakland, educated in the public schools of California and has never been outside the continental limits of the United States. Since attaining his majority he had been a registered voter and taxpayer. (R. 39.) He registered under the Selective Training and Service Act of 1940 but when called for examination was rejected for military service because of a physical defect. (R. 39.) Thereafter, in order, as an American citizen, to be of service to this nation in our defense effort, he took up the study of welding, exhausting his savings therefor. Upon completion of the course he found temporary employment as a welder in various shipyards engaged in defense production. (R. 39-41.) When refused employment because of his ancestry he returned to labor in his father's nursery. (R. 39.)

On May 30, 1942, he was arrested in the City of San Leandro, Alameda County, California, was de-

livered to agents of the Federal Bureau of Investigation and thereafter was charged with a violation of Public Law No. 503 in the information. (R. 1.) At the time of his apprehension he had deliberately remained in the said City of San Leandro knowing he was then within the confines of Military Area No. 1 prescribed by Public Proclamation No. 1 of General DeWitt dated March 2, 1942, and knowing that he had been ordered excluded therefrom by the provisions of Civilian Exclusion Order No. 34 issued by said General on May 3, 1942, commanding him as a person of Japanese ancestry to submit to evacuation therefrom by the Army for internment in a concentration camp. (R. 33.) His reasons for refusing to obey the military mandate were that he did not wish to abandon his girl and to leave his home and friends. (R. 36-37.) To avoid detection and escape evacuation from his home and eventual internment in a concentration camp he adopted the pseudonym of "Clyde Sarah", which he inserted on his draft card and had a surgical operation performed to alter his facial characteristics. (R. 41.) The surgical operation was a failure.

The appellant has but a trifling speaking knowledge of colloquial Japanese but has neither a reading nor writing acquaintance with that language. He has never attended a Japanese language school. (R. 40.) He has never renounced or lost his citizenship in the United States and owes no allegiance to any country other than the United States or to any nation other than the people of the United States. (R. 40.) He is and ever has been ready and willing to bear arms for this

country and to render any service he might be called upon to perform by our government in our war against the axis nations, including the Empire of Japan. (R. 41.)

He was tried, found guilty and convicted by the District Court of a violation of Public Law No. 503 as charged in the information and was sentenced to probation for a period of five years. (R. 25.) Being released into the custody of the Army he was dragged away and confined to an assembly center situated at Tanforan, San Mateo County, California, then under the control of the Wartime Civil Control Administration, a military agency set up by General DeWitt. Thereafter he was removed under military guard to a war relocation center set up by the War Department and situated in the vicinity of Topaz, an arid spot in the State of Utah.

After the entry of the judgment of conviction and probationary sentence the petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, raising therein the same federal constitutional questions and issues as originally set forth in his demurrer (R. 3) and supplemental demurrer (R. 22) to the information and in his motions for a dismissal made at the close of the government's case in chief (R. 38) and at the close of his defense (R. 41) and in his motion in arrest of judgment (R. 42) after conviction by the District Court. While said cause was pending before that Court the appellee, respondent herein, moved to dismiss the appeal on the ground that the probationary sentence was not a

final order from which an appeal would lie. After oral arguments on said motion and on the merits of the cause and issues it involved had been concluded and the matter submitted to that Court, sitting *in bank*, owing to a diversity of opinion among the Justices of the Circuit Court of Appeals, said Court, pursuant to the provisions of section 239 of the Judicial Code as amended (28 USCA, sec. 346), certified to this Court the question whether or not it had jurisdiction to entertain the appeal. This Court, on June 1, 1943, answered the question in the affirmative. *Korematsu v. United States*, 87 L. Ed. 1086. Thereafter, on December 2, 1943, said Circuit Court of Appeals rendered its judgment (R. 97) and filed its opinion (R. 57) together with the opinion of Denman, C.J. (R. 60), concurring in the result but dissenting from the grounds of the majority opinion, and the concurring opinion of Stephen, C.J. (R. 86), which dismissed the motion to dismiss the appeal and affirmed the judgment of the trial Court.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Ninth Circuit erred in affirming the action of the District Court in overruling the demurrer (R. 3) and supplemental demurrer (R. 22) to the information interposed by the petitioner, in denying his motion to dismiss the information and to render a judgment of not guilty made during the course of the trial at the close of the

government's case in chief (R. 38), his like motion made at the close of defendant's case (R. 41) and his motion in arrest of judgment (R. 42), each of which motions was made upon all of the grounds set forth in the demurrer and supplemental demurrer, and in affirming the judgment of conviction and probationary sentence imposed upon him by the District Court. (R. 97.)

Petitioner intends to urge the errors be assigned in the Circuit Court (R. 45-48) which, in substance, assert the invalidity of the statute under which he was convicted and the military orders he was charged with violating. The specific errors which petitioner assigns as having been made by the District Court and by the Circuit Court in affirming the judgment and which he urges and intends to rely upon herein are that said Courts erred in failing to hold that the statute as applied to the petitioner was void on the following grounds:

1. For delegating unlimited legislative powers to Courts, juries and military commanders to determine what acts shall be deemed criminal and punishable thereunder in violation of section 1 of Art. I of the Constitution;

2. For delegating unlimited judicial power to military commanders to regulate the activities of civilians engaged in civil occupations in violation of section 1 of Art. III of the Constitution;

And in failing to hold the military orders involved herein and the statute applied as their enforcement

machinery unconstitutional and void on the following grounds:

3. As depriving him of his liberty and property without due process of law, as taking his private property under an asserted claim of taking for a public use without just compensation and as subjecting him to an infamous punishment, all in violation of the 5th Amendment;

4. As constituting a bill of attainder forbidden by section 9, clause 3 of Art. I of the Constitution;

5. As inflicting upon him a cruel and unusual punishment in violation of the 8th Amendment;

6. As infringing his right to be secure against unreasonable searches and seizures in violation of the 4th Amendment;

7. As subjecting him to internment without a charge of crime being brought against him and without affording him a hearing in violation of the 6th Amendment;

8. As imposing upon him in an internment camp a condition of slavery and involuntary servitude in violation of the 13th Amendment.

9. As working a corruption of blood and forfeiture upon him, without trial, upon the theory of the constructive treason of his remote ancestors in violation of section 3 of Art. I of the Constitution.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

The petitioner contends that the statute under which he was convicted and placed on probation is void as applied for delegating unlimited legislative power to Courts, juries and military commanders to determine what acts shall be deemed criminal and punishable in violation of section 1 of Art. I of the Constitution and is also void for delegating unlimited judicial power to military officers to exercise authority and control over civilians engaged in civilian pursuits in violation of section 1 of Art. III of the Constitution.

The petitioner also contends that the military orders he disobeyed and the military orders providing for his imprisonment and detention in a concentration camp and the statute in being applied as their enforcement machinery are unconstitutional and void as operating to deprive him, in the absence of crime on his part and without a hearing, of his rights of national citizenship, his liberty and property without due process of law and his private property under an asserted claim the taking is for a public use without just compensation and as an infamous punishment, all forbidden by the 5th Amendment; as a bill of attainder forbidden by section 9, clause 3 of Art. I of the Constitution; as a cruel and unusual punishment in violation of the 8th Amendment; as infringing his right to be secure against unreasonable searches and seizures in violation of the 4th Amend-

ment; as subjecting him to internment without an accusation of crime being lodged against him and without affording him a hearing in violation of the 6th Amendment; as imposing upon him a condition of slavery and involuntary servitude forbidden by the 13th Amendment and as working a corruption of blood and forfeiture, without trial, upon the theory of the constructive treason of his remote ancestors in violation of section 3 of Art. I of the Constitution.

The petitioner also contends that these military orders providing for the arrest, banishment and internment of the petitioner and similarly affected citizens were never authorized by Executive Order No. 9066 or any presidential order or by Congress.

The petitioner also contends that there exist no provable facts or facts of actual public notoriety which a Court can take for granted by an assumption of judicial knowledge in order to sustain the existence of a military necessity justifying the application of military orders arresting, banishing and detaining the petitioner in custody at the whim of a military commander in an area which is not under martial rule.

THE MILITARY ORDERS CHALLENGED HEREIN AND THE STATUTE AS APPLIED ARE VOID FOR ABRIDGING FUNDAMENTAL CONSTITUTIONAL PROVISIONS.

Preliminary statement.

The majority opinion of the Circuit Court of Appeals disposed of the petitioner's "major contentions without their mention, much less their consideration."

(See statement of Denman, C. J., in his concurring opinion, R. 61.) It was based upon the belief that the principles decided in *Hirabayashi v. U. S.*, 87 L.Ed. 1337, were decisive of all the issues involved herein, sustaining the whole evacuation program of General DeWitt. This Court, however, has never passed upon the validity of a civilian exclusion order upon which the evacuation program hinged or upon the statute involved herein as the enforcement procedure for this mass banishment. In the *Hirabayashi* case this Court upheld a curfew regulation promulgated by General DeWitt, limiting its decision to this one issue in the following language:

> "We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power."

Without the express sanction of a statute the curfew order might have been sustained as a proper exercise of federal police power (war power) by the military authorities if applied impartially to civilians. There is an obvious difference, however, between a mere curfew regulation and the military orders involved herein commanding the arrest and confinement in a concentration camp of a loyal and law abiding citizen engaged in civilian pursuits simply because he is descended from ancestors who once owed allegiance to Japan.

The whole sad, sorry and sordid plot and plan of these unprecedented military orders, of which the civilian exclusion order involved herein was but one

step in a unit succession of orders constituting a single program of incredible cruelty to the petitioner and some 70,000 similarly injured citizens, is reviewable by this Court. *Hirabáyashi v. U. S.*, 87 L.Ed. 1337; *Lovell v. Griffin*, 303 U.S. 444; and *Thornhill v. Alabama*, 310 U.S. 88. These orders are nothing if not penal *lettres de cachet*. They discriminate against the petitioner and thousands of other citizens likewise engaged in civilian pursuits simply because they are descended from ancestors who once were nationals of Japan. Public Proclamations Nos. 1 and 2 set up military districts of States-embracing extent. Under extraordinary orders the petitioner and some 70,000 citizens of like ancestry were first ordered to report changes in their places of residence (Public Proclamation Nos. 1 and 2); then subjected to curfew regulations and travel restrictions in the military areas (Public Proclamation No. 3) and were then ordered to remain frozen in these areas. (Public Proclamation No. 4.) Thereafter the civilian exclusion orders were issued and the mass exodus was under way. Civilian Exclusion Order No. 34 excluded petitioner from the portion of Alameda County where he resided, ordered him into an Assembly Center under penalty of being charged with a violation of Public Law No. 503 and destined him for final imprisonment in an internment camp. From various Assembly Centers these people were thereafter deported and confined to concentration camps called War Relocation Centers, a few of which were within and a few outside General DeWitt's military district. (See Public Proclamation WD-1 dated August 13, 1942, published in 7 F.R. 6593.) Thus was

a whole chapter lifted from Hitler's "Mein Kampf" and applied in America. Thus the counterpart of the European ghetto and the Russian pale arose in America.

It is strange that General DeWitt made no provision whatever to examine into the loyalties of these citizens if any among them were regarded by him with suspicion. It is to be noted that it is the function of the Department of Justice to protect the civilian population against acts of espionage and sabotage and that this Department was competent to ferret out subversive civilians. It had adequately performed its duties in arresting all persons suspected of being a menace to our security, whether German, Italian or Japanese, and had confined them to special internment camps and had given each of them an individual hearing. (See, survey of the activities of the Department of Justice issued by Attorney General Biddle during week of December 1, 1942.) Like hearings were neither given nor provided to be given to the prospective evacuee citizens by General DeWitt although the Army or the Department of Justice could have given such examinations within the period elapsing between December 7, 1941, and the time the respective civilian exclusion orders were issued, the last of which was issued in August of 1942. Consequently it cannot be argued that he did not have ample time within which to examine them to ascertain if there were any disloyal members in their midst. Under these orders the petitioner and these other citizens were stripped of their belongings. Their vocations were ruined. They were torn from their homes at

the points of bayonets and driven into stockades which the military authorities have steadily endeavored to term, in more polite terms, Assembly Centers. Thereafter they were evacuated, a euphemistic term meaning they were driven into concentration camps where they are compelled to suffer the indignities of involuntary servitude. Substantially all their rights of national and state citizenship have been destroyed. Despite these facts, the Circuit Court sustained the validity of the statute, Civilian Exclusion Order No. 34, and the internment on the strength of the *Hirabayashi* case without giving much consideration to the following major contentions of the petitioner.

(1)

THE STATUTE UNLAWFULLY DELEGATES UNLIMITED LEGISLATIVE POWER TO COURTS, JURIES AND MILITARY COMMANDERS.

The statute is void on its face and as applied to the petitioner for containing an unconstitutional delegation of *unlimited legislative power* to Courts and juries to determine what acts shall be criminal and punishable thereunder in violation of Sec. 1 of Art. I of the Constitution. *U. S. v. L. Cohen Grocery Co.*, 255 U.S. 81. It would also seem void as applied herein when read in conjunction with Executive Order No. 9066. The presidential order authorized the removal of persons from necessary military areas and the employment of federal transportation means and accommodation facilities for evacuated persons. It neither prescribed specific military areas of the states embracing nature later set up by General DeWitt nor

authorized the indiscriminate mass deportation and imprisonment of prospective evacuees upon the basis of the nationality of their ancestors.

Congress is empowered to delegate a *limited discretionary power* to executive officials in aid of the enforcement of a statute if it sets up a standard for their guidance and leaves to them the determination of facts to which the congressional policy is to apply. *Schechter Poultry Corp. v. U. S.*, 295 U.S. 495. Neither Congress in the statute in question nor the President in Executive Order No. 9066 set up any specific standards for the guidance of the military commander, but this failure did not lodge unlimited or arbitrary authority in his hands to be wielded as prejudice or caprice might dictate. In the *Hirabayashi* case, this Court decided that Congress and the Executive, acting together, could authorize a temporary curfew restriction as an emergency war measure. It likened the trifling infringement on personal liberty to that imposed by the police establishment of fire lines during a fire and the confinement of people to their houses during an air raid alarm. The orders involved herein, however, are not of a comparable nature or trifling in their infringement of personal liberty.

The set of hypothetical and highly disputable facts which the Court felt impelled to assume as true and labelled facts of public notoriety in the *Hirabayashi* opinion to sustain the validity of a curfew measure was necessitated by the failure of General DeWitt to reveal to the public any factual findings and reasons

for the application of his curfew order. A similar assumption of facts would not be justifiable in this case where we are concerned with military orders which strike at the very roots of constitutional rights and have no reasonable relation to public safety. It is just such military orders as are involved herein that this Court had in mind in declaring:

> "It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order."

Confronted with a similar set of assumed facts in cases involving citizens of German extraction on the East Coast, two District Courts, since the *Hirabayashi* decision was rendered, have held individual exclusion orders invalid. These decisions were made on the basis of taking judicial knowledge that there was not present at the time of the application of the orders a substantial basis for the judgment of a military commander that the threat of espionage and sabotage to our military resources was real and imminent. See *Schueller v. Drum*, 51 Fed. Sup. 383, and *Ebel v. Drum*, 52 Fed. Sup. 189.

General DeWitt's "Final Report, Japanese Evacuation from The West Coast" was publicly released on January 19, 1944. On page 7 thereof he reveals that his evacuation program was designed and carried into execution simply because he entertained the belief that the "distribution of the Japanese population" on the Pacific Coast "appeared to manifest something more than coincidence" and that it was "ideally situated with reference to points of strategic importance, to

carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so." This statement together with the highly debatable facts collected since the completion of the evacuation and set forth in his report (pages 7-19) in justification of his orders demonstrate his action to have been based upon a generalized suspicion he entertained of these citizens simply because of their racial origin and geographical distribution. This post-evacuation document compiled so belatedly does not appear to contain sufficient reasons to sustain a view that the evacuation was a military necessity or that it was based upon an exercise of sound judgment. The document itself demonstrates that the military necessity he relied on to justify this terrible program was an apparition. The evacuation and imprisonment of these citizens was a military blunder of the first order. General DeWitt ought to have foreseen that the racial discrimination he intended to practice here would give our Japanese enemies fodder for the propaganda machine they long had been operating in Asia to enlist the sympathies of Oriental peoples against Occidentals. He ought also to have foreseen that his intended action would arouse skepticism of our democratic processes among our dark complexioned Allies and among our own peoples. That it was prejudice and not a bona fide military necessity that evoked these drastic orders appears to be fully sustained by the testimony of General DeWitt given before a House Naval Affairs Sub-committee in San Francisco which was widely circulated by press

and radio. The San Francisco News of April 13th, 1943 quotes him as having testified as follows:

"Charges of a movement to bring American-born Japanese back to the Pacific Coast were made today by Lieut. Gen. DeWitt, commanding general of the Western Defense Command and Fourth Army, at a House naval affairs subcommittee hearing here. He said he would oppose this movement 'with every effort and means at my disposal.'

"'I don't want any Jap back on the Coast', said General DeWitt, after informing the committee of 'a feeling developing in certain sections and among certain elements' to bring these American-Japanese back to the Coast military area.

"There is no way to determine their loyalty', he declared. 'This West Coast is too vulnerable. I am opposing this movement with every effort and means at my disposal.

I have two problems—defending this Coast against espionage and sabotage by the Japs and driving them off the face of the map in the Aleutians.

It makes no difference whether the Japanese is theoretically a citizen—he is still a Japanese. Giving him a piece of paper won't change him.

I don't care what they do with the Japs as long as they don't send them back here. A Jap is a Jap.'"

It cannot be said that the arresting, evacuation and imprisonment orders conformed to a standard ap-

proved by Congress or that they were made with the support of findings showing such a conformity or that they were actually authorized by the President. Hawaii had been in a theater of war and contains defense installations, facilities and materials on a proportionate scale unmatched on the Pacific Coast. It is and has been a military target of great importance, and since the outbreak of war has been under martial rule. The military authorities there, in the exercise of sound judgment, applied a curfew regulation upon the populace without racial discrimination but did not resort to an indiscriminate mass arrest, banishment and imprisonment of citizens or aliens on a racial origin basis. The Japanese aliens and citizens of Japanese extraction comprise approximately 37.3 per cent of the population of Hawaii. (H.R. 2124, 77th Cong., 2nd Sess., May, 1942, pp. 91, 94.) Not one authentic case of espionage, sabotage or other criminal act on the part of any of these people occurred there. (H.R. 2124, pp. 48-59.) General DeWitt must be assumed to have been familiar with these facts. On the Pacific Coast which has neither been in a theater of war nor under martial rule not one case of disloyalty upon the part of Japanese residents, citizen or alien, who were later evacuated, arose. (See statement of Denman, C.J., in *Korematsu v. U. S.*, R. 79.) There has not been one authenticated case of an attack upon any of them by lawless elements in our midst. If his curfew measure, under these circumstances, was an appropriate measure to meet an imminent danger of espionage or sabotage to our military resources, if he suspected any such criminal action as the *Hirabayashi*

opinion speculates he might have, it would seem to follow that in applying his exclusion and internment orders he trespassed beyond the scope of appropriateness and abused his discretion. Thousands of youths of Japanese ancestry had long served in the Territorial Guard of Hawaii and in other armed branches of the military service, and were so serving at the outbreak of war as General DeWitt knew before he issued these orders. The blood these youths have shed in Hawaii, in the South Pacific and in Italy eloquently testifies to their loyalty and that of their families. In view of these facts, can a Court take judicial notice or assume judicial knowledge that General DeWitt exercised sound judgment or that he had a rational basis to support the application of his drastic deportation orders? His long silence before publicly revealing his reasons is to be construed as indicating his action was arbitrary and inspired by prejudice or was based upon mere suspicion or gross hearsay. If is evident it was not an exercise of sound judgment.

(2)

THE STATUTE UNLAWFULLY DELEGATES UNLIMITED JUDICIAL POWER TO MILITARY COMMANDERS.

The conclusion is inescapable that General DeWitt, in the recesses of his own mind, conducted a mock trial of the petitioner and some 70,000 similarly situated citizens in which his unexpressed accusation was that he either disliked, distrusted or feared them because he harbored prejudice against them by reason of their ancestry or because he suspected or believed, without a rational basis therefor, that a few among

them could possibly commit crime. Apparently his charge against them was possible guilt by possible association with persons of possible criminal tendencies. On the basis of such an absurdity he adjudged them guilty and condemned them to deportation and imprisonment until he or a higher governmental authority might see fit to release them. This treatment violates the due process clause of the 5th Amendment and the provisions of the 6th inasmuch as the areas were not under martial rule. See *Ex parte Milligan*, 4 Wall. (U.S.) 2; *U. S. v. L. Cohen Grocery Co.*, supra, and *Hamilton v. Kentucky Distilleries*, 251 U.S. 146. The orders were the product of judicial power usurped by him in violation of Sec. 1 of Art. III of the Constitution and violate the provisions of the 6th Amendment. It could not have been the intention of Congress to confer judicial power upon the military commander in this statute. Neither Congress nor the Executive are authorized by the Constitution to emasculate the judicial branch of government.

(3)

THE MILITARY ORDERS AND THE STATUTE AS APPLIED HEREIN VIOLATE THE 4TH, 5TH, 6TH, 8TH AND 13TH AMENDMENTS.

The statute as applied to enforce the provisions of the military orders involved herein, and especially Civilian Exclusion Order No. 34 as applied to petitioner, is unconstitutional and void for the following reasons:

(a) It abridges his fundamental *privileges and immunities* of national citizenship guaranteed by Sec. 2, cl. 1 of Art. IV of the Constitution and the due process clause of the 5th Amendment. These rights,

abridged herein, are "vital to the maintenance of democratic institutions", *Schneider v. Irvington,* 308 U.S. 147, 161, and are "immutable principles of justice which inhere in the very idea of free government," *Holden v. Hardy,* 169 U.S. 366, 389. They include "freedom of movement" (*Crandal v. Nevada,* 6 Wall. 35, 48-49, and concurring opinions in *Edwards v. California,* 314 U.S. 160); and the right "to live and work" where one wills. (*Allgeyer v. Louisiana,* 165 U.S. 578, 589.) The petitioner's right to work is a property right of which he was deprived by his imprisonment under military orders in violation of the 5th Amendment. *Truax v. Raich,* 239 U.S. 33, 38. It is significant, too, that no provision was made to compensate the evacuees for the property losses they suffered as required by the 5th Amendment.

(b) It infringes his right to be secure in his person, house, papers and effects against *unreasonable searches and seizures* in violation of the 4th Amendment and in arresting and detaining him in military custody without an accusation of crime being lodged against him and without affording him a hearing and the incidents thereof it violates the 6th Amendment. The due process of law guaranteed by the 5th Amendment requires a hearing in an administrative proceeding before a person can be deprived of his liberty. *See Opp Cotton Mills, Inc. v. Administrator,* 312 U.S. 126, 152-3. Sufficient time elapsed between December 7, 1941, and the time each exclusion order issued in which each of these citizens affected could have been examined as to his loyalty either by the military or the civil authorities.

(c) It is a *bill of attainder* forbidden by Sec. 9, cl. 3 of Art. I of the Constitution and the due process clause of the 5th Amendment, in that it encouraged and enabled the military commander, by the threat of its application to him, without judicial trial, to expatriate and banish him not for the commission of crime but solely by reason of the nationality of his forebears or his complexion derived from them. *In re Yung Sing Hee* (C.C. Ore.), 36 Fed. 437; 16 *Corpus Juris Secundum*, 902-3. Banishment constitutes an *infamous punishment* forbidden by the 5th Amendment. See *U. S. v. Moreland*, 258 U.S. 433, and discussion of Mr. Justice Brewer in separate opinion in *U. S. v. Ju Toy*, 198 U.S. 253, 269-270, stating that it is also a *cruel and unusual punishment* prohibited by the 8th Amendment. See also *Ex parte Wilson*, 114 U.S. 417. The internment of the petitioner in a concentration camp which the orders and statute were designed to effectuate and did accomplish was not imposed for the commission of crime upon his part and consequently subjects him to a condition of *slavery and involuntary servitude* prohibited by the 13th Amendment. See *Slaughter-House Cases*, 83 U.S. 36, and *Smith v. U. S.*, 157 Fed. 721, cert. den. 208 U.S. 618, discussing Civil Rights Statutes (18 USCA 51) guaranteeing personal liberty. In the concentration camps the evacuees have been put to work assigned by the government authorities in charge at peon wages. (H.R. 2124, p. 207.) It is also apparent that the orders and statute as applied herein work a corruption of blood or forfeiture, without trial, upon the theory of the constructive treason of petitioner's remote ancestors which is repugnant to the provisions

of Sec. 3 of Art. III of the Constitution. See *Shortridge v. Macon*, 22 Fed. Cas. No. 12,812; 63 *Corpus Juris* 814; and *Ex parte Bollman*, 4 Cranch 75.

(4)

TESTS OF LIMITS OF MILITARY AUTHORITY WERE IGNORED BY COURTS BELOW.

Even under the war power there are limits to the authority a military commander may exercise. His action is reviewable by our Courts. In *Sterling v. Constantin*, 287 U.S. 378, 398, this was declared to be a judicial function in the following language:

> "What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case are judicial questions."

This Court there declared that the action of a military commander is not to be "taken as conclusive proof of its own necessity" and that it is not to be "accepted as in itself due process of law." It decided that a military commander "is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order." It laid down the test that such measures must be "conceived in good faith, in the face of an emergency, and directly related to the quelling of the disorder or the preventing of its continuance." It also declared that the test is not conclusively met by "mere executive fiats." See also: *Moyer v. Peabody*, 212 U.S. 78 and *Mitchell v. Harmony*, 13 How. 115, 134. Neither the District nor the Circuit Court applied these tests to the facts in this case. It is significant that the petitioner was not engaged in any

unlawful action, but on the contrary, has ever been a loyal citizen, ready, willing and able to serve this country in any capacity in which the government would permit him. It is also significant that the appellee herein at the trial below, despite the duty incumbent upon it, made no effort to support its burden of proof that the military action taken against him pursuant to these orders was taken in good faith or that it was directed to the suppression of any criminal act in which the petitioner was engaged. Its failure to produce any evidence tending to support this burden is conclusive that it was unable so to do. Its failure in this respect necessarily raises the conclusive presumption that there was neither necessity for the issuance of the military orders involved nor for their application to the petitioner or to any of the 70,000 citizens injured thereby. The District Court and the Circuit Court erred in failing to give due weight to this contention of the petitioner.

CONCLUSION.

This petition presents constitutional issues of a novel nature and great gravity. The final determination of these questions is a matter of national concern and, to a degree, is a matter of international concern. The rights of national citizenship of the petitioner and 70,000 American citizens and native-born children who have been unfortunate enough through no fault of their own but solely by the accident of birth, to have had ancestors who, for a period of time, were nationals of Japan directly depend upon the final determination of the issues involved herein. Indirectly

the rights and liberties of all native-born and naturalized citizens likewise depend on the final settlement of these issues. Whether the Constitution any longer possesses efficacy is at stake herein. Whether this nation may, with truth, be identified as a republican democracy or whether, because of public apathy and indifference, it has surrendered all governmental power to the executive division without a struggle are the fundamental questions this Court must decide. If the question finally were to be resolved against the petitioner the conclusion would necessarily follow that our Courts had ceased to function as the judicial department and had been distorted into an appendage to the executive branch. In such circumstances this Court would no longer be interested in judicial questions but merely in writing the epitaph of a lifeless Constitution. We cannot believe that such is the mission of this Court and the destiny of this Republic.

The petition for a writ of certiorari to the Ninth Circuit Court of Appeals should be granted and, upon a full hearing, the judgment should be reversed.

Dated, San Francisco, California,
February 2, 1944.

Respectfully submitted,

JACKSON H. RALSTON,
Attorney for Petitioner.

WAYNE M. COLLINS,
Of Counsel.

(Appendix Follows.)

Appendix

STATUTE, EXECUTIVE ORDER AND MILITARY ORDERS, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED.

Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, H. R. 6758, approved March 21, 1942 (see Title 18, U. S. Code, sec. 97a), the application and validity of which is involved herein, reads as follows:

> "Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Executive Order No. 9066, the construction of which is involved herein, was promulgated by the President under date of February 19, 1942. It appears in the *Federal Register* of February 25, 1942, in Vol. 7, No. 38, page 1407. It reads as follows:

> "Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense ma-

terial, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said

Proclamations in respect of such prohibited and restrictive areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder."

The continental United States is divided for military purposes into seven military districts or commands. One of these is designated the "Western Defense Command" which was, until recently, under the command of J. L. DeWitt, Lieutenant-General, U. S. Army. It embraces the entire States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska. The following public proclamations and civilian exclusion orders hereinafter discussed were issued by said General DeWitt and appear in Volume 7 of the Federal Register.

Public Proclamation No. 1, promulgated March 2, 1942, establishes two military areas. These are "Military Area No. 1", which embraces the western halves of Washington, Oregon and California and the southern half of Arizona, and "Military Area No. 2", which embraces the eastern halves of Washington, Oregon and California and the northern half of Arizona. (See 7 F. R. 2320.)

Public Proclamation No. 2 was promulgated March 16, 1942, and establishes four additional military areas which are designated "*Military Areas Nos. 3, 4, 5 and 6*", respectively, and embrace the entire States of Idaho, Montana, Nevada and Utah. (See 7 F. R. 2405.)

These foregoing two zoning proclamations required alien enemies and persons of Japanese ancestry residing in the said Military Areas to report any change in their places of residence.

Public Proclamation No. 3, promulgated March 24, 1942, imposed "curfew" regulations upon these people, prohibited them from traveling beyond a distance of five miles from their residences and compelled the confiscation of certain articles of personal property they possessed, including weapons, radios, cameras and signal devices. (See F. R. 2543.)

Public Proclamation No. 4, promulgated March 27, 1942, prohibited all alien and non-alien Japanese within the limits of Military Area No. 1 from leaving the said military area. (See 7 F. R. 2601.)

Headquarters
Western Defense Command
and Fourth Army
Presidio of San Francisco, California
May 3, 1942

CIVILIAN EXCLUSION ORDER NO. 34

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P.W.T., of Saturday, May 9, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows:

> All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said Highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly, and following the shoreline of San Francisco Bay to the point of beginning.

2. A responsible member of each family, and each individual living alone, in the above described area

will report between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or during the same hours on Tuesday, May 5, 1942, to the Civil Control Station located at:

920 - "C" Street,
Hayward, California.

3. Any person subject to this order who fails to comply with any of its provisions or published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P.W.T., of Saturday, May 9, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones", and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DEWITT
Lieutenant General, U. S. Army
Commanding

C. E. Order 34

Western Defense Command and Fourth Army
Wartime Civil Control Administration
Presidio of San Francisco, California

INSTRUCTIONS
to All Persons of
JAPANESE
ANCESTRY

Living in the Following Area:

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly and following the shoreline of San Francisco Bay to the point of beginning.

Pursuant to the provisions of Civilian Exclusion Order No. 34, this Headquarters, dated May 3, 1942, all persons of Japanese ancestry, both alien and non-alien, will be evacuated from the above area by 12 o'clock noon, P.W.T., Saturday, May 9, 1942.

No Japanese person living in the above area will be permitted to change residence after 12 o'clock noon, P.W.T., Sunday, May 3, 1942, without obtaining special permission from the representative of the Commanding General, Northern California Sector, at the Civil Control Station located at:

920 - "C" Street,
Hayward, California.

Such permits will only be granted for the purpose of uniting members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.

2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles and livestock.

3. Provide temporary residence elsewhere for all Japanese in family groups.

4. Transport persons and a limited amount of clothing and equipment to their new residence.

The following instructions must be observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control

Station to receive further instructions. This must be done between 8:00 A. M. and 5:00 P. M. on Monday, May 4, 1942, or between 8:00 A. M. and 5:00 P. M. on Tuesday, May 5, 1942.

2. Evacuees must carry with them on departure for the Assembly Center, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;

(e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group.

3. No pets of any kind will be permitted.

4. No personal items and no household goods will be shipped to the Assembly Center.

5. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household items, such as iceboxes, washing machines, pianos and

other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

6. Each family, and individual living alone, will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or between the hours of 8:00 A. M. and 5:00 P. M., Tuesday, May 5, 1942, to receive further instructions.

J. L. DEWITT,
Lieutenant General, U. S. Army
Commanding

May 3, 1942

See Civilian Exclusion Order No. 34.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 22

FRED. TOYOSABURO KOREMATSU,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANT.

Petition for Certiorari Filed February 8, 1944.
Certiorari Granted March 27, 1944.

WAYNE M. COLLINS,
Mills Tower, San Francisco 4, California,
Counsel for Appellant.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR APPELLANT.

Petition for Certiorari Filed February 8, 1944.
Certiorari Granted March 27, 1944.

QUESTION PRESENTED.

Can a loyal American citizen be branded a criminal under the provisions of Public Law No. 503 (18 USCA, sec. 97a) for resisting military *lettres de cachet*, issued in an area free from martial rule, which commanded his seizure, removal from his home, detention in a stockade, banishment from a states-

embracing military department and final imprisonment in a concentration camp, all without trial and without an accusation of crime being brought against him?

OPINION BELOW.

The opinion of the United States Circuit of Appeals for the Ninth Circuit (R. 33-64) is reported in 140 Fed. (2d) 289.

JURISDICTION.

This Court has jurisdiction to review the judgment of the District Court below and the decision of the Circuit Court below affirming it by virtue of the provisions of Section 240(a) of the Judicial Code, as amended. (28 USCA, sec. 347a.) Appellant's petition for certiorari filed herein on February 8, 1944, was granted March 27, 1944.

STATUTE, EXECUTIVE ORDERS AND MILITARY ORDERS THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED HEREIN.

Public Law No. 503 (18 USCA, sec. 97a), Executive Order No. 9066 and Civilian Exclusion Order No. 34 are set forth in the Appendix hereto. The remaining proclamations and orders are mentioned and summarized in the context of this brief with references to the official repositories in which they are to be found.

SPECIFICATION OF ERRORS.

The appellant assigns the errors in the record and proceedings below as set forth on pages 21 to 24 of his petition for certiorari heretofore filed herein.

STATEMENT OF FACTS.

This is an appeal by Fred Toyosaburo Korematsu, a civilian and native-born American citizen, from a judgment of conviction against him in the District Court below for an alleged violation of the provisions of Public Law No. 503. (18 USCA, sec. 97a.) He was adjudged guilty and placed on probation for five years because, in the exercise of his constitutional rights of national and state citizenship, he resisted unlawful military orders issued by John L. DeWitt, a Lt. Gen., U.S.A., which were designed to banish him from his home and imprison him in a concentration camp set up for him simply because in his line of ancestry there are to be found a few persons who, either by the accident of birth or residence, may be asserted to have owed in the dim past a temporal allegiance to a long forgotten Mikado. Branded a criminal and impoverished by his own government which he ever has been ready and willing to defend with his own life he is compelled to prosecute his appeal *in forma pauperis*.

The appellant is a 25-year-old citizen of the United States and the State of California. He was born on January 30, 1919, in Alameda County, California, where he continuously resided until his arrest herein

on May 30, 1942. His parents who were born in Japan long have been residents of this country. He was educated in our public schools. He was willing to enlist in the Army but was informed by his doctors that he was unfit for service because he suffered from stomach ulcers. Because of this physical defect he was rejected by the Army when called for military duty under the Selective Training & Service Act of 1940. Disappointed at this refusal he spent his worldly savings of $150.00 to prepare himself to become a welder in order to contribute his services to our defense effort. He lost his employment after the outbreak of war because of his ancestry. (R. 24-25.)

General DeWitt's proclamation of March 27, 1942, prohibited him from leaving the limits of military area No. 1. Four weeks before he was scheduled to be confined to a stockade by order of the General he left home to earn enough money to enable him to marry the girl of his choice, a Caucasian girl of Italian extraction. He remained in Alameda County, however. He didn't wish to be ousted from his home or to leave his girl and friends. Nobody would. He decided to evade evacuation by migrating to the Middle West. To prevent social ostracism upon settling there he underwent a plastic operation to alter his features in the hope of passing for a Caucasian and assumed the name of Clyde Sarah. The operation was unsuccessful. (R. 20.)

On May 3, 1942, he was ordered to report on May 9, 1942, for imprisonment in the Tanforan Assembly Center by the General's civilian exclusion order No.

34. He was never given a chance to migrate voluntarily. He was denied this right by the aforesaid orders. He failed to report for evacuation. He was apprehended in San Leandro, Alameda County, California, on May 30, 1942. He was indicted on June 12, 1942, and on September 8, 1942, was tried and convicted for a violation of Public Law No. 503, and placed on probation.[1] General DeWitt neither considered, appreciated nor respected Korematsu's wishes and rights in the matter. He had the appellant taken from the courtroom and incarcerated in the Tanforan Assembly Center and thereafter ordered him deported and imprisoned in the Central Utah War Relocation Center situated at Topaz, Utah.

The appellant has a slight knowledge of the Japanese language. He has never attended a Japanese language school. He has no police record. He has no dual citizenship. He is a loyal citizen who has exer-

[1]The statute was never anything but a lash by which compliance with military orders was obtained and innocent citizens subjugated to the caprice of a military commander. When released on bail pending trial the appellant was seized and cast into the Tanforan Assembly Center, a stockade, upon instructions of General DeWitt. The General thereby demonstrated his contempt for the Courts. The appellant was produced for trial in the custody of armed military police. The appellant's loyalty to this nation was proved at the trial. Nevertheless, when judgment was pronounced and the appellant placed on five years' probation the military police, acting upon the General's orders, escorted him directly from the courtroom to confinement in the stockade. Evidently the General expected the Court to act as a ratifier and not as a rectifier of wrong. Apparently he feared injustice might be treated of its victim. He was not concerned that Korematsu's loyalty had been proved. His anxiety to imprison and deport a loyal citizen demonstrates the motive that prompted his evacuation program was not born of his concern for national security but of prejudice against Americans of Japanese lineage.

cised the rights and performed the duties of citizenship. He has never been outside the continental limits of the United States. He is and steadily has been ready and willing to render whatever services he may to this nation in our war against the Axis powers. (R. 24.) More could not be asked or expected of any citizen.

Korematsu had the good fortune, so we have been taught, to be born an American national who, upon attaining his majority automatically succeeded to the right to exercise all the privileges of citizenship. He had, however, the misfortune, so we have learned, to have been deemed by General DeWitt, by a queer quirk of logic, to have selected a few ancestors over whom a deceased ruler in old Japan may have claimed suzerainty. His crime, under Public Law No. 503, was that he resisted his scheduled "evacuation" and "relocation," deceitful words by which the General would entice us into the belief these were genuine security measures designed to protect the public from him and him from the public. By evacuation the General meant *banishment* and by relocation he meant *detention* so that the whole outrageous program or pogrom, as you will, as planned and carried into execution, was *imprisonment* without cause, without justification and without trial in defiance of the very letter and spirit of the Constitution which, by solemn oath, he was bound to defend and preserve. It makes little difference whether this was the exact schedule as originally planned or as subsequently developed by progressive stages. The primary objective was banish-

ment and, as the program unfolded, final imprisonment loomed in the offing. The Courts below have sustained the General's nation-shaking plan and constitution-destroying orders. This appeal is prosecuted that there shall be a final determination of the rights of a citizen in wartime in an area free from martial rule.

Significant facts.

It is highly relevant to the issues herein that on the eventful December 7, 1941, there were thousands of American citizens of Japanese lineage serving in our armed forces. In addition to those serving in the National Guard in Hawaii many were serving in the Territorial Guard of Hawaii.[2] Thousands on the mainland long prior thereto had registered under the Selective Training and Service Act of 1940. In excess of 5000 had been called to the colors and were serving with honor, credit and distinction. (See letter of the President to the Secretary of War dated February

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[2] Disappointed when inactivated in March, 1942, by General Delos C. Emmons, Commander of the Hawaiian Department, a group of these from the University of Hawaii organized themselves into the Varsity Victory Volunteers, tendered their services to General Emmons, were accepted and detailed to the 34th Combat Engineers. This group was inactivated after 11 months of service to enlist in the Army. Excluded from the draft, 10,000 volunteered to form the 442nd Combat Team which made history in Sicily and on the bloodstained beaches at Salerno. See article in Army and Navy Register, "Americans of Japanese Descent", January 22, 1944, Vol. 65, No. 3346, p. 13, and article entitled "Hawaii—Fortress of the Pacific", by Lt. Gen. Robert C. Richardson, Jr., in Dec. 7, 1943 issue of Army Navy Journal, p. 48. The remarkable record of the 100th Infantry Battalion formerly a unit of the National Guard of Hawaii, is also well known to the nation

1, 1942, and H.R. 2124, p. 143.)[2a] Attention is to be drawn to the fact that at the time many were serving in the Military Intelligence Service and that today there are not fewer than 600 of these youths performing excellently in G-2 in the Central, the South and the Western Pacific Areas where they are considered indispensable by our military commanders in those theaters of operation. It is reasonable to conclude that each family of Japanese stock within our jurisdiction had its representative in our armed forces at the outbreak of war and several representatives since. These facts are not publicized by the War Department because of the chagrin it must feel when reflecting upon the wrongs inflicted upon these people. Apparently General DeWitt alone of our departmental military commanders failed to repose confidence in these servicemen and their families. It is extraordinary that while our commanders in the battle areas considered and knew them to be reliable defenders of our security General DeWitt, in the comparative safety of our Western states, would convince us they were a potential menace to our national security. He excluded American soldiers of Japanese pedigree and their families from the forbidden military areas he established. He excluded those among them who were veterans of the first World War.

[2a] References herein to House Reports Nos. 1911 and 2124 and House Resolution No. 113, abbreviated to H.R. 1911, H.R. 2124 and H.Res. 113, relate to published Hearings before the Select Committee Investigating National Defense Migration, 77th Cong. 2nd Sess. 1942, commonly called the Tolan Committee reports. General DeWitt's "Final Report: Japanese Evacuation From the West Coast" which was publicly released on January 19, 1944 is referred to herein as "Final Report."

Facts underlying banishment and the technique of oppression.

Immediately following the air attack upon Pearl Harbor on December 7, 1941, the President enjoined Japanese nationals within our jurisdiction to preserve the peace and prohibited them from possessing firearms, ammunition, signal devices, cameras, short wave radios and other articles of a contraband nature. (Public Proclamation No. 2525, 6 F.R. 6321.) On December 8, 1941, he placed similar injunctions upon German and Italian nationals within our jurisdiction. (Public Proclamations No. 2526, 6 F.R. 6323, and No. 2527, 6 F.R. 6324.) His proclamations were issued under authority of the Alien Enemy Act, 50 USCA 21, and authorized the Attorney General to enforce the provisions thereof on the mainland and the Secretary of War on our outlying possessions. (See also, H.R. 2124, pp. 294-300.) On December 8th Congress declared war on Japan. On December 11th Germany and Italy declared war on us and Congress retaliated by declaring war on them.

On the 7th Japanese nationals in Hawaii and American nationals of Japanese ancestry went through the first baptism of fire in this war. Many of them were slain and many wounded by the bombing by our Japanese enemies. They suffered more civilian casualties than all of the other ethnic groups combined. See Andrew W. Lind's, "*The Japanese in Hawaii Under War Conditions*" (1943), American Council Institute of Pacific Relations. The bombing demonstrated that our enemies bore no love for the Japanese long residents in Hawaii and their American children.

The Department of Justice lost no time in apprehending alien enemies deemed to be dangerous to our security. The F.B.I. promptly arrested and interned 5000 Axis nationals. (Annual Report, F.B.I., 1941.) By June 30, 1942, it had taken 9405 into custody. (Annual Report, F.B.I., 1942.) A total of 12,071 Axis nationals taken into custody under authority of the Alien Enemy Act upon being interned in special internment camps in North Dakota and elsewhere in the Middle West were given individual administrative hearings by the Department of Justice. Of the Japanese all except 1974 were released after examination. (See report of Attorney General covering survey of the activities of his office released during the week of December 1, 1942.) This figure probably has been reduced since the survey was published.

By the end of January, 1942, a press demand for the evacuation of alien enemies arose. (H.R. 1911; p. 2.) There was little, if any, separate agitation against Japanese aliens and their native-born offspring resident on the Pacific Coast until the latter part of February, 1942, when it was rumored that General DeWitt might desire an evacuation of "all Japanese" from the region. Thereafter an artificial clamor of a sporadic nature was instituted against them by cunning persons long known to be hostile to Orientals. A few persons of diseased minds endeavored to inflame public opinion against them through the medium of absurd petitions, press diatribes and

jingoist radio broadcasts.[2] A few cowardly public officials with an eye to personal publicity declaimed against them. A few ignorant town councils in backward rural areas passed illegal restrictive measures against them, with a view, of course, to ousting them from farming areas so that their properties might be acquired at a trifle of their values. Behind the mask of artificially created war-hysteria anti-Oriental pressure groups carried on their machinations designed to result in the deportation of these people. Masquerading in the customary garb of patriots these opportunists were willing to create misery and suffering upon the part of a helpless minority unmindful of the fact that thousands of Americans of Japanese parentage then were serving in our armed forces to defend the security of this nation. They sought to invoke the craven spirit of vigilantism in order that they might derive either political preferment or private profit for themselves. They deliberately labelled these innocents disloyal and sought to have the public confuse them with our hostile alien enemies. Puffed up with their own importance, while resting in the sheltered comfort and security of civilian life, they unsuccess-

[2] Whether or not General DeWitt was influenced by this flood of propaganda is a matter of conjecture. If he was, his subsequent action taken against them was not founded upon fact but upon fiction, from which it would follow that he became a mere tool in the hands of the sponsors who set the machinery of oppression in motion. If not, his action was purely the result of personal prejudice.

fully spurred the public on to acts of lawlessness.[4] These quiet citizens, thousands of whose sons were in uniform, suffered the agonies of war and, along with their families, these insults and humiliations and, finally, the embarassment of banishment and imprisonment, all because of the color of their skin, the slant of their eyes, the religions they professed and the old nationality of a few of their forebears. The public, being neither ignorant, prejudiced nor of a lawless breed, was not misled by the rising tide of propaganda but greeted it with the silence it merited and exhibited not the slightest inclination to molest these people. A genuine public demand for the evacuation of these citizens never arose.

On January 14, 1942, the President, by Public Proclamation No. 2537, required all alien enemies to acquire ideintification certificates. Between January 29, 1942, and February 7, 1942, the Attorney General, under authority delegated to him by the President, set up zones upon the West Coast and restricted the activities of all alien enemies therein.[5] (H.R. 2124,

[4]The old discarded cry of the "yellow peril" was fished up from the gutter of the past and resuscitated by them oblivious to the fact that in so doing they exhibited the yellow streaks that ran up their own backs. Many of those who would terrorize these citizens are those hyphenated-Americans whose spiritual home is in Europe and who ought, in good conscience, take up residence there. For a history of this agitation see H.R. 2124 pp. 149, 150, 156.

[5]The restrictive measures taken by the President and by the Attorney General were imposed and enforced under the Alien Enemy Act and affected only those alien enemies of the "age of 14 years and upward" under the Act. This zoning and restricting action of the Attorney General later was duplicated and then expanded by General DeWitt, not pursuant to the Act, but under an empty claim that it was authorized by Executive Order No.

pp. 302-314.) The restrictive areas encompassed national defense material, premises and utilities defined in 50 USCA, Sections 101, 102, a statute entitled, "Willful Destruction of War or National Defense Material," a violation of which is punishable by 30 years' imprisonment and $10,000 fine under Section 102 or a like sum and 10 years under Section 105. The declared purpose of setting up these prohibited zones was to prevent acts of espionage and sabotage to such material, premises and utilities. These proclamations had a reasonable relation to national security and properly were invoked under the Alien Enemy Act. On February 4, 1942, the Attorney General announced that an area extending from 30 to 150 miles inland from the Pacific Coast had been declared a "restrictive area" and on the same day he established curfew regulations and placed travel restrictions upon all alien enemies residing therein. (H.R. 2124, p. 310.) Approximately 10,000 German, Italian and Japanese nationals departed from the forbidden areas and settled in outside areas. These alien enemies were not confined to concentration camps. (H.R. 1911, p. 2.)

A general's inhumanity to citizens.

On March 2, 1942, General DeWitt set up Military Areas Nos. 1 and 2 and required alien enemies and

9966. The General, however, applied his orders to Japanese aliens and citizens of Japanese ancestry but not to German and Italian nationals. It does not appear that the General consulted the Attorney General on the matter but the fact that he invaded the domain of the Attorney General is clear. The Attorney General didn't call upon General DeWitt to take over his duties. By training, inclination and perspective the Attorney General's office was better fitted to handle civil affairs than the General.

citizens of Japanese ancestry in Military Area No. 1 to give notice of change of residence.* (Public Proclamation No. 1, 7 F.R. 2320.) Thereafter, on March 16, 1942, he set up four additional military areas, viz., Military areas Nos. 3, 4, 5 and 6 and required of like residents therein a similar giving of notice of change of residence. (Public Proclamation No. 2, 7 F.R. 2405.) The military department of General DeWitt's command so set up embraces eight Western States and comprises in excess of one-fourth of the total geographical area of the continental United States. (His jurisdiction also included Alaska.) In this department the General would play and has played the part of an arbitrary and merciless ruler over citizens of Japanese lineage. National defense material, premises, and utilities are situated in certain localities within his Military Department but they do not by any means occupy the whole extensive prohibited areas he set up.

On March 18, 1942, the President issued Executive Order No. 9102 (7 F.R. 2165) establishing the War Relocation Authority, an executive office, to formulate and effectuate a program for the removal from military areas designated by military commanders of persons or classes of persons designated but not evacuated therefrom under Executive Order No. 9066.

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*Military Area No. 1 embraces the westerly halves of Washington, Oregon and California and the southern half of Arizona, while Military Area No. 2 embraces the remaining halves of said states. Military Areas 3 to 6 inclusive took in the whole of the following states, viz., Idaho, Montana, Nevada and Utah.

On March 21, 1942, Public Law No. 503 (18 USCA 97a) became effective. It makes it a misdemeanor for anyone to enter or leave military areas contrary to a military commander's unknown orders to be prescribed *in futuro* without, however, prescribing any standard, rule or policy to guide the military commander in prescribing areas and without setting limits to his authority to control the activities of civilians therein.

On February 13, 1942, a delegation of West Coast congressmen, without hearing any witnesses but probably influenced by the propaganda that had been directed against alien enemies generally, sent a letter to the President suggesting that it might be desirable for the Army or the Department of Justice to remove from "all strategic areas" all persons "whom they may select" whose presence was inimical to national defense. (H.R. 1911, p. 3.) Its recommendation was not directed to an indiscriminate mass removal of persons or to a segment of our people on the basis of ancestry but to the removal of certain individuals from limited areas containing military resources.

In early February, 1942, the Tolan Committee, the House of Representatives Select Committee Investigating National Defense Migration, was authorized to

Responses by various state governors to this committee's telegrams inquiring if the states would accept prospective evacuees from the West Coast, with few exceptions, show these officials to be opposed to dumping "alien enemies" in their respective states. Very few of them raised any objection to citizens of Japanese ancestry. See replies, H.R. 1911, pp. 27-31. The objection to such dumping arose from economic and political but not from racial reasons.

open public hearings touching upon the question of evacuating persons and made arrangements to open its hearings in San Francisco and Los Angeles on February 21, 1942.

Thereafter, on February 19, 1942, the President signed Executive Order No. 9066 (7 F.R. 1407) authorizing military commanders to prescribe military areas from which any and all persons might be excluded. It had been prepared by the War Department and presented to him. (*Final Report*, p. 25.) It also provided that federal agencies might be utilized to provide for the transportation, food, shelter and other accomodation of persons who might be prohibited from leaving or entering military areas so prescribed. It ratified the restrictive action that had been taken against alien enemies by the Attorney General. Its purpose was declared to be the taking of every possible protection against espionage and sabotage to national defense material, premises and utilities defined in 50 USCA, Sections 101 and 104. It contains no language authorizing a discriminatory evacuation of persons based upon an ancestral origin or without affording the affected residents a hearing on the question of a necessity for their removal. It is from this order, however, that the proclamations and exclusion orders hereinafter mentioned assert they derive their questionable validity.

On February 19, 1942, a bill, S. 2293, providing for the detention of any or all Japanese was introduced in the Senate but it failed to pass. (See 88 Cong. Rec. Feb. 19, 1942. Tolan Com. Rep., S. Rep. No. 1496,

Calendar No. 1541 (1942).) The Attorney General rendered an opinion that American citizens of Japanese ancestry were not removable under presidential orders. The General, however, acted like Ajax when the counsel of Ulysses was given. He disregarded the opinion of the Attorney General and removed them. On March 23 and 24, 1942, Edward J. Ennis, Director of the Alien Enemy Control Unit, testified before the Tolan Committee that the transfer of control over citizens in the excluded areas from the Attorney General to military commanders was designed for acceptance by the public as "an exercise of the war power." (H.R. 2124, p. 166.) The Attorney General's office is an executive one and could exercise delegated war powers as well as the military commander; consequently, it would seem that the evacuation was not made any more acceptable to the victims and to the public by urging that an arbitrary discrimination becomes lawful merely by labelling it "an exercise of the war power."

Thereafter, on March 24, 1942, he commenced his pernicious campaign against citizens of Japanese ancestry. By Public Proclamation No. 3 (7 F.R. 2453) he subjected the appellant, all alien enemies and persons of Japanese ancestry within Military Area No. 1 and zones in Military Areas Nos. 2 to 6 inclusive to curfew regulations and travel restrictions. Therein he threatened the citizens affected thereby

In *Hirabayashi v. U. S.*, 320 U. S. 81, the curfew regulation imposed by this proclamation was held justifiable for a limited period of time as an emergency war measure under the circum-

with criminal prosecution under Public Law No. 503 for a violation of its provisions and alien enemies affected thereby with internment for a violation thereof. (Citizens who violated the orders, however, have been jailed first and thereafter interned.) It also prohibited the affected citizens and aliens from possessing designated articles of personalty of a contraband nature and compelled the confiscation thereof without making any provision for compensation. Evidently he did not comprehend the provisions of the 5th Amendment which forbids the confiscation of private property under an asserted claim that the taking is for public use unless the taking is accompanied or followed by just compensation. Neither expressly nor impliedly has Congress authorized the General to declare the private property of citizens to be contraband and subject to confiscation. This was a direct deprivation by General DeWitt without prior or subsequent authorization.

On March 24, 1942, he also issued Civilian Exclusion Order No. 4 (7 F.R. 2581) excluding all Japanese descended persons from Bainbridge Island, Washington, allowing those who received permission to leave to depart by March 29, 1942, for destinations outside the boundaries of Military Area No. 1 and enjoining those remaining there on March 30, 1942, to report to a Civil Control Station, for evacuation and involuntary exile."

"The "voluntary" exile of those who were permitted to depart was of short duration for as the evacuation program expanded those who had taken up temporary residence in Military Area No. 2 in California were picked up and imprisoned in concentra-

On March 27, 1942, he promulgated Public Proclamation No. 4 (7 F.R. 2601), a freezing order, which prohibited the citizen appellant and all persons of like lineage from leaving the limits of Military Area No. 1 where they resided. The hypocrisy of this order becomes apparent when it is discovered that it was asserted to be necessary to insure an orderly evacuation and resettlement of Japanese "voluntarily" migrating from Military Area No. 1. He would lead us to believe the bayonets that backed his commands were pointless. (See also Pub. Proc. No. 6, 7 F.R. 4436, which froze them in Military Area No. 2.)[10] It threatened citizens with criminal prosecution under Public Law No. 503 and Japanese nationals with internment for a violation of its provisions. On March 30, 1942, he issued Public Proclamation No. 5 (7 F.R. 3725) permitting certain German and Italian nationals exemption from exclusion from military areas. Like exemptions were not allowed alien Japanese and citizens although many of these citizens were American

tion camps. This indicates the original plan of the commander was more concerned with imprisonment than with mere evacuation and indicates the program was not designed as a security measure but was the offspring of his prejudice against Americans of Japanese descent.

[10] His excuse for freezing residents in Military Area No. 2 including the emigrees from No. 1 therein is now asserted to have been to prohibit "further migration out of or into that area in preparation for controlled evacuation". (Final Report, p. 105.) Apparently he was not aware that freedom of movement is a privilege of national citizenship. Had he ceased interfering with citizens' rights at a "voluntary" departure stage it might have been argued he was sincerely concerned about national security. No voluntary migration period was offered the great majority of these people, however. When he issued these freezing orders he demonstrated his action was inspired by nothing but prejudice and that his objective was their deportation and detention.

soldiers of Japanese ancestry who desired to visit members of their families in the forbidden areas. Did the undiscerning General consider German and Italian alien enemies to be defenders and these citizens, friendly aliens and American soldiers a menace to our security?

On March 30, 1942, he announced, for the first time that an evacuation "*was in prospect for practically all Japanese*". See H.R. 2124, p. 165; and Press release, Wartime Civil Control Administration, March 30, 1942. This being the first indication that he intended this discriminating action against Americans of Japanese descent proves that neither Congress nor the President were aware of his real intentions on February 19, 1942, when Executive Order No. 9066 was signed and on March 21, 1942, when Public Law No. 503 was passed by Congress and approved by the President.

The civilian exclusion orders.

Thereafter he issued a series of civilian exclusion orders[1] which resulted in the roundup and forcible

[1] A total of 108 civilian exclusion orders was issued by the General, No. 1 having issued on March 24, 1942 (7 F.R. 2581) and the last, No. 108, having issued on August 18, 1942 (7 F.R. 6703). Each of these is published in Vol. 7 of the Federal Register. Although the battle of Midway had been won on June 6, 1942, by our forces and our island outposts thereby were rendered secure from danger of invasion the General continued on until the latter part of August, 1942, issuing exclusion orders and until October 30, 1942, in removing these people to relocation centers. This suggests that he entertained no fear of espionage or sabotage on the part of any of these people but that he was bent on their exile from the Pacific Coast because of his prejudice against them. His insistence upon having numbers of them

seizure of some 73,000 citizens of Japanese lineage and 43,000 Japanese aliens, few of whom were of military age. (H.R. 1911, p. 12; H.R. 2124, p. 91 et seq.) His armed troops escorted them to stockades adroitly misnamed "Assembly Centers" and "Reception Centers". The prisoners were deposited in fifteen of these temporary prisons which were surrounded by barbed wire and patrolled by military police. Twelve of these were situated in California and one in each of the following states, namely, Washington, Oregon and Arizona. (*Final Report*, map and legend, p. 158.) The first deportees to occupy any of these arrived on March 27, 1942, and the last on May 10, 1942. The first stockade to be vacated was closed out on June 2, 1942, and the last on October 27, 1942. (Ib., p. 158.) If he really believed these people to be spies and saboteurs or to be harboring spies and saboteurs in their midst why did he delay from December 7, 1941, to March 30, 1942, before removing the first contingent into assembly centers? If he suspected them of criminal tendencies why did he delay thereafter until May 10, 1942, before removing all of them into assembly centers? The days before the battle of the Coral Sea (May, 1942) and the battle of Midway (June 2-6, 1942) which stemmed the tide of Japanese aggression in the South and Central Pacific were critical ones.[12] Had he suspected them of such acts

imprisoned in the four camps outside his military department is more suggestive of an ingrained prejudice against these people than of any fear of danger to national security from them.

[12] The appellant was apprehended on May 30, 1942, and convicted on September 8, 1942. On both dates Hawaii was safe from invasion and from air attack although it was not then certain that an air attack could not be made. The mainland was not threatened.

or proclivities he would not have taken so long to incarcerate them. He would not have incarcerated them in compounds on the Pacific littoral in the very military area from which he would lead us to believe the greatest danger from them existed. This would seem to corroborate the evidence that his banishment program was prompted less by suspicion of them than by his personal prejudice against them.

From these temporary prisons the prisoners were removed by the General to final imprisonment in concentration camps set up especially for them and euphemistically misnamed "War Relocation Centers". These camps are ten in number, two being situated in each of the following states, namely, California, Arizona and Arkansas, and one in each of the following states, namely, Utah, Colorado, Wyoming and Idaho. (Ib., pp. 249-264.) Six of these are within the Western Defense Command, the military department of General DeWitt, and four *outside* his department. Each of these prisons is surrounded by barbed wire and patrolled by armed guards. The transfers from assembly to relocation centers started on May 26, 1942, and were completed on October 27, 1942. (Ib., pp. 282-284.) In establishing the Tule Lake and Manzanar Relocation Centers on the Pacific Coast the General certainly indicated he entertained no fear of espionage or sabotage on their part. The recent conversion of the camp at Tule Lake into a segregation center for those denied leave clearance suggests that those responsible for its conversion do not anticipate much trouble from the internees. If there existed any

reliable evidence of a predisposition on the part of any of them to commit overt hostile acts or if the authorities in charge feared any such acts the internees would have been confined to prisons far inland.

Under this series of civilian exclusion orders which the General issued under the pretext of color of authority of Executive Order No. 9066 the banishment and imprisonment program of these people was accomplished in method as follows: They were excluded systematically from the whole of California (Public Proclamations Nos. 4 and 11; 7 F.R. 2601 and 6703) and from Military Area No. 1 in Washington, Oregon and Arizona unless they were within the bounds of Assembly Centers which were under the control of the "Wartime Civil Control Administration", a military agency set up by General DeWitt. (See also, Pub. Proc. No. 7; 7 F.R. 4498.) Under the prodding of military escorts these orders drove them into the fifteen assembly centers.[18] From these centers they later were conveyed, under the goads of military guards, to relocation centers which were managed by the War Relocation Authority, the executive agency created under Executive Order No. 9102. On May 19, 1942, he issued Civilian Restrictive Order No. 1 (8 F.R. 982) prohibiting these people from leaving these

[18] The Japanese aliens and Americans of Japanese descent in the "B" zones of Military Area No. 2, except in California, and Military Areas Nos. 3 to 6 inclusive have not been placed in concentration camps but they are forbidden to leave the small restrictive zones and, consequently, are imprisoned therein. All of those who resided in California are imprisoned in concentration camps.

assembly and relocation centers without authority.[1] On June 27, 1942, he promulgated Public Proclamation No. 8, (7 F.R. 8346), a general detention order, which designated existing and future relocation centers within his military department as "War Relocation Projects". It required the inmates to remain within the bounds thereof and visitors to obtain written permission from his headquarters to visit them. The confinement was not designed to be temporary but indefinite in nature.

By letter dated August 11, 1942, the General delegated authority to the W.R.A. to issue permits for "conditional leave" from these prisons to persons who could qualify therefor. On August 13, 1942, approximately nine months after the outbreak of war, the Secretary of War issued Public Proclamation WD-4 (7 F.R. 6593) under which the relocation centers outside General DeWitt's military department were designated military areas and the departure of persons of Japanese stock there confined was forbidden without permission of the Secretary of War or the Director of the W.R.A. The War Department, consequently, must share the blame with the General for the harm done to these people. If it was not a principal in the matter it was, nevertheless, an aider or abettor.

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[1] There seems to have been little necessity for the issuance of this order for the prisoners were confined to compounds bounded by barbed wire and were kept under surveillance of armed troops who patrolled outside with instructions to shoot any who attempted to make a break for freedom. The order was a mockery.

Citizens of Japanese lineage and Japanese nationals residing on the Atlantic seaboard and in other states outside General DeWitt's department were and are allowed freedom of movement without interference. Had these people been suspected of a predisposition to espionage and sabotage by the military commanders in whose departments they reside and where national defense material, premises and utilities abound, they, too, would have been taken into custody. Evidently our departmental military commanders do not share General DeWitt's prejudices and suspicions.

Jurisdiction and practice of the W.R.A.

Under the provisions of Executive Order No. 9102 the Director of the W.R.A. was vested with the ostensible authority to provide for the relocation, maintenance and *supervision* of all persons deported from the military areas. He was also authorized by its terms to establish the W.R.A. Work Corps, to prescribe the work to be performed by the evacuees in the corps and the compensation to be paid. Although internees recruited to perform seasonal work outside these camps are paid the low wages their labor may fetch in the labor market those employed in the camps are eligible to receive either $12, $16 or $19 per month and no more although they labor eight hours per day. (*W.R.A. Manual*, Chap. 50.5 par. 6-A et seq.) Labor unions and the government appear quite indifferent about these peon wages and the provisions of the 13th Amendment insofar as these citizens are concerned. Under this presidential order the W.R.A. has estab-

lished a procedure whereby internees who are found to be loyal may obtain a release from the immediate confines of the concentration camps and step out into the freedom of a larger prison.

The mechanics of this freedom are as follows: An internee may apply for a "leave clearance", a permit reminding us of the barbarous permit systems of totalitarian states. The grant of this clearance depends entirely upon the whim and caprice of the Director. No hearing is granted to the applicant. The Director considers secret reports of the F.B.I. and other data contained in a *dossier* which he maintains on the applicant. The confined citizen is offered no opportunity to learn the nature of any charge against him, to examine any statements or to contest matters in the *dossier* adverse to his interest. He is tried in the style first instituted by General DeWitt, that is, *in camera*, in the recesses of the Director's mind. It is neither a judicial nor an administrative hearing but it is an expression of usurped legislative and judicial power. The citizen is neither charged with disloyalty nor offered an opportunity to demonstrate his loyalty. A grant of leave clearance is a finding that the applicant is loyal. If the application is granted the applicant thereafter is allowed to apply for a type of conditional leave. The types are designated, *short term leave*, *seasonal work leave* and *indefinite leave*. Each type, however, is subject to restrictions and to revocation. See Part 5, Chap. 1, Title 32, *Code of Federal Regulations*, as amended January 1, 1944.

(9 F.R. 154.). Also see, *W.R.A. Manual*, Chaps. 60 and 110.

The most favorable form of leave to an applicant is indefinite leave which is made dependent upon whether the applicant is capable of self-support and whether the community in which he intends to reside will accept him. These conditions are determined arbitrarily by the Director without any hearing being granted the applicant. It is to be noted that indefinite leave is just as vague and indefinite as its name. It does not entitle the recipient to return to his home situated within the states embracing military department of General DeWitt's Western Defense Command, an automatic exclusion from one-fourth of the geographical area of the United States. (General DeWitt would not recognize the finding of loyalty. His exclusion rules are still enforced.) Before such a leave will be granted the applicant must consent to make reports to the Director of any change of residence or employment. Wherever the applicant might be allowed to go on this leave he remains not only in the custody of the W.R.A. but also in the "*constructive custody of the military commander*" in whose jurisdiction the relocation center lies where the leave permit is issued. See *W.R.A. Administrative Instruction No. 22*, paragraph 9, dated July 20, 1942. This instruction was superseded in July, 1943, but the military jurisdiction still obtains. He is not allowed to return to his home and former employment. The exclusion orders have not been revoked but are still in

force. In whatever light this leave is viewed it will be seen that it amounts to nothing more than increasing the size of the applicant's prison. This is a strange freedom to allow an American citizen when the grant of leave itself is a finding by the Director that the applicant is loyal to this country. Wherever, therefore, you meet any of these ex-inhabitants of the Pacific states, reflect for a moment. They are on leave —of course, only to perform menial tasks wherever the W.R.A. and the military authorities will permit them to go and remain by sufferance. You may not see the invisible ropes tied to them and leading back to the W.R.A. and General DeWitt that compels them to respond like puppets to governmental caprice but they are very real ropes nevertheless.

Civilian Exclusion Order No. 34 destined the appellant to banishment and imprisonment.

Civilian Exclusion Order No. 34 dated May 3, 1942, excluded the appellant from the south section of Alameda County, California. This area is conspicuously notable for the absence of national defense material, premises and utilities.[1] The order required him to

[1] The region is a rural one largely devoted to truck farming and cattle grazing. If the General was so intent upon removing these people from areas where acts of espionage and sabotage might be committed and he really suspected them of being bent upon such crimes why did he transport them from a farming area into the midst of military and defense installations where such acts easily could have been committed by internees so inclined? This move suggests that the confinement was not designed to prevent such acts at all but that it was inspired by prejudice and was but one step in a plot to banish these people from the Pacific Coast, an objective long sought by rabid baiters of Orientals.

report to a Civil Control Station situated in Hayward to receive instructions preparatory to being driven, under duress, into an assembly center situated at Tanforan, San Mateo County, California, which was situated west of his home and some 15 miles closer to the Pacific shoreline. This center was situated in the very midst of military premises and installations and in the vicinity of coastal fortifications. It adjoined military, naval and civilian air fields and was adjacent to defense plants. A violation of this order was declared therein to render him liable to criminal prosecution under Public Law No. 503. The statute, by this means, was used as an instrument to drive the appellant and similar Japanese descended citizens into the stockade which was designated an assembly center. It was for an alleged violation of this order that the appellant, after apprehension, was indicted, tried, convicted and placed on probation by the District Court below, from which judgment this appeal was initiated. The order was issued under a claim it was authorized by Public Proclamations Nos. 1 and 2 which were asserted to derive their validity from Executive Order No. 9066. When ordered on probation the appellant was reseized by military police, under the General's instructions, and was taken from the courtroom to the Tanforan Assembly Center where he was again imprisoned. From this temporary prison he was ordered transported to the Central Utah War Relocation Center and was taken there sometime during October, 1942. His imprisonment was precisely that originally scheduled by General DeWitt's punitive evacuation

program. The order was but a unit step in the program that destined him to banishment from the Pacific states and final imprisonment.

Thus for the first time in the history of this Republic a veritable reign of terror was established over a segment of our citizenry which found a portion of our populace apathetic to this terrible precedent and a few ignorant officials, state and federal, viewing with approval or disinterest a situation they had sought to create. Thus were these citizens deprived of their liberties and properties, reduced to misery and suffering and treated with less consideration than we give hostile alien enemies. We would not mistreat prisoners of war because of the political repercussion that would follow in its wake and because of the probability of reprisals on our citizens in the hands of our enemies. No nation, however, will protest our mistreatment of our own citizens. Civilians, men, women and children, have been uprooted, driven from their homes like cattle and imprisoned behind barbed wire and are herded by armed guards. It is contended by the appellee that this barbarianism is due process of law because we are engaged in a war. It is for this Court to determine whether the due process clause of the 5th Amendment, which was designed to expand our rights and liberties, is to be used as a knife to whittle away the Constitution itself.

The whole imprisonment program is reviewable.

The original exclusion of the appellant and other citizens of Japanese ancestry from their homes, their

temporary confinement to stockades, their transfer to concentration camps, the permission granted those found to be loyal to increase the size of their jails but not to return to their former homes and employments are not separate and distinct injuries. They are parts of one single program, the aim, purpose and result of which was their permanent banishment from the Pacific Coast. Public Law No. 503 was nothing but one of the instruments by which this was accomplished. Citizens were exiled whether or not they violated the provisions of this statute. The appellant was scheduled for banishment and destined for imprisonment in a concentration camp by General DeWitt despite the fact that as to citizens the only punishment provided for a violation of military orders, if lawful, was that provided by the statute. He was not banished and imprisoned for violating the statute but for disobeying the General's Constitution-destroying military orders which were nothing if not penal *lettres de cachet* issued and enforced in an area not under martial rule. Consequently, the questions to be determined by this Court are not only whether the General had a right, as distinct from the power, to do these things, but whether the Courts can brand the appellant a criminal for resisting these right-destroying orders instead of preserving his constitutional rights by removing the brand of criminal from him regardless of what the military commander has done to him. There can be no doubt that insofar as the appellant's rights are concerned herein that the entire imprisoning program called an "evacuation"

is reviewable by this Court. *Hirabayashi v. United States*, 320 U. S. 81; *Lovell v. Griffin*, 303 U. S. 444.

The appellant was scheduled for banishment and imprisonment by General DeWitt and has escaped neither. It is to be presumed that the General was aware that Japanese, German and Italian nationals suspected of being dangerous to our security were promptly arrested by agents of the F.B.I. upon the outbreak of war. It must be assumed he knew that these aliens were given prompt individual hearings by the Department of Justice at which they were offered ample opportunity to demonstrate their lack of hostility to this nation and that the great majority of them were found to be friendly to us and released. Like hearings were never given to the deported citizens by General DeWitt or the W.R.A. The elements of due process of law were observed in the administrative hearings given to the alien suspects by the Department of Justice. No hearings whatever, judicial or administrative, were given or provided to be given to the evacuated citizens either before or since their evacuation. No hearings were contemplated, scheduled or given to them by the W.R.A. These citizens were kidnapped and are held in duress. Why is it that the General, and the W.R.A., executive agents, arbitrarily can dispense with or exercise judicial power in a manner denied to our Courts? White alien enemies have been better treated than these citizens and have been accorded the due process of law denied them.

There was no immediate threat of espionage or sabotage to our military resources from these people during the period from December 7, 1941, to the time of their evacuation. It was during this critical period that Japan was on a groping offensive in the Central, Southern and Western Pacific areas. The utter absence of such acts during this period proves the want of danger from these people. Nevertheless the General started on his program by issuing exclusion orders. Japan's advance eastward toward Hawaii was stopped in the Battle of the Coral Sea, May 4-8, 1942. (See Navy Dept. Communiques Nos. 77 of May 7th and No. 88 of June 12, 1942, Army Navy Journal, June 13, 1942, p. 1130.) Nevertheless the General kept on issuing his exclusion orders. Japan's naval might was crushed in the Battle of Midway on June 2-6, 1942. This overwhelming victory prevented any further advance by Japan and secured our Hawaiian outposts from any danger of invasion. (See Communiques Nos. 1-5 of Admiral Chester W. Nimitz, Commander in chief, U. S. Pacific Fleet and Pacific Ocean Areas, issued June 4-6, 1942; also article by Major General Willis H. Hale, Commanding General, U.S.A. 7th Air Force, Army & Navy Register, Vol. 65 No. 3352 of March 4, 1944.) Nevertheless the General continued on issuing his exclusion orders and in transferring citizens from assembly centers to relocation centers. Our invasion of the Solomon Islands in July-August, 1942, threw the Japanese back and secured our lines of communication to Australia. Nevertheless the General continued on issuing exclusion orders and in transferring citizens to relocation centers. When

the last of these people had been confined to a relocation center on October 27, 1942 (*Final Report*, p. 158) even though the mainland United States was secure from danger of any invasion and even from the possibility of an isolated attack by airplanes that might have attempted to reach our shores, the General was insistent upon the incarceration of these people. Is it credible that he believed these people were bent upon acts of espionage and sabotage? Can it be doubted that his whole evacuation program was the product of his violent prejudice against these people?

On October 29, 1942, the General removed his restrictive measures taken against Italian nationals and on December 29, 1942; he lifted the curfew restrictions on German nationals. He failed, however, to remove any of the restrictions placed upon American citizens of Japanese descent which indicates his prejudice against them had not abated.

SUMMARY OF ARGUMENT.

The appellant contends that the statute under which he was convicted and placed on probation is void for uncertainty and for delegating unlimited legislative power to military commanders, courts and juries to determine what acts shall be deemed to be criminal and punishable. He also contends that it is void for delegating unlimited judicial power to a military commander to sit in judgment upon him, to prejudge him without trial and to condemn him to exile. He also contends that the military orders command

ing his banishment from an area free from martial rule and ordering his imprisonment in a concentration camp, in the absence of crime upon his part and without an accusation of crime being brought against him, and the statute as their enforcement machinery, are void for being repugnant to the provisions of the 4th, 5th, 6th, 8th and 13th Amendments.

ARGUMENT.

I.

THE PRESIDENT NEITHER AUTHORIZED NOR APPROVED THE PROGRAM.

The evacuation plan originated neither with the President nor with the Congress. It does not appear that either division of government was apprised of the true nature of the plan until it had been put into operation. Although neither interfered their non-interference is not equivalent to approval or ratification. Neither the advice nor the approval of either was solicited prior to its institution. Executive Order No. 9066 was not personally prepared by the President. It was prepared in the War Department for his signature. (*Final Report*, p. 25.) It does not disclose on its face that a vicious discriminatory program to banish and imprison these people was contemplated. Taken at its face value it authorized the prescription of necessary military areas immediately encompassing necessary national defense materials, premises, and installations, the exclusion of any or all persons therefrom and the employment of federal agencies and

means to provide necessary "transportation, food, shelter and other accommodation" for residents who might be excluded therefrom. It did not give the General either military custody or jurisdiction over citizens or authorize him to regulate their movements.

It does not seem credible that the President expected the commander to exclude persons indiscriminately from the immense geographical areas prescribed by General DeWitt. It could scarce be expected that this order, by a fair construction of its language, would put him on notice of the unexpressed intentions of this military commander. Under the press of the business and duties of his office at the time he could not be expected to scrutinize the order with the nicety and precision necessary to disclose the subtle plans of the commander. There appears to be no reliable evidence that he has ever approved the sorry action. His failure to intervene and put a halt to it when first it became known to him does not signify approval on his part of the plan adopted or the policy pursued under the guise of his order. It has been characteristic of him that he seldom has meddled in the affairs of military commanders, seemingly leaving it to our Courts to determine whether they have overstepped the allowable limits of military discretion, a matter always reserved to the Courts for judicial review. (*Sterling v. Constantin*, 287 U. S. 378.) (General DeWitt has been removed from the Western Defense Command however.) Nothing in the order itself authorizes a discriminatory mass exclusion on the basis of the old nationality of one's forebears—nothing

therein authorizes the deportation and detention of any person. The most that can be said is that it authorizes the removal of certain persons from limited military areas to the outskirts of the areas and no farther. Nothing therein authorizes a commander of a Military Department to prescribe military areas of states-embracing extent or to establish prohibited military areas therein except those which might be limited to the immediate locality where national defense material, premises, and utilities are situated, around which military guards might be posted to protect them against espionage and sabotage.

If it be argued that the President was informed of the plan and approved it in its entirety we must examine into his powers to ascertain whether he may wield any such authority. What he cannot do military commanders under him who constitute a part of the executive division of government cannot do. Executive Order No. 9066 does not assert it was executed under authority of the Alien Enemy Act. With or without such a declaration, however, the President could authorize the removal and detention of alien enemies by presidential warrants. It is probable that he is authorized to dispense with individual warrants and remove them *en masse*. He did not, however, issue such warrants and there appears to be no evidence that he authorized General DeWitt to remove them from the forbidden areas set up by the General or to detain them. Alien enemies were excluded from the restrictive zones set up by the Attorney General, however, the removal being referable directly to the

Alien Enemy Act. The presidential order declares that its authority is that vested in him by the Constitution. Consequently, in so far as it might be asserted to authorize any control over citizens, if it has constitutional sanction, it must be that he invoked his powers to issue it either in his capacity as President or as Commander-in-Chief of the Army and Navy, the latter including the Marine Corps and the Coast Guard.

His powers as President are civil powers circumscribed by the Constitution—his powers as Commander-in-Chief are military powers circumscribed by law. As President his civil authority over civilians is limited to the execution of the laws enacted by Congress. As Commander-in-Chief he exercises a limited authority over only members of the federal armed forces on the active list. The title originally was not designed to confer authority upon him to direct the activities of troops in the field in wartime but to permit him, as the chief civilian selected by the voters, to outrank all our military and naval commanders. Primarily it had social and political significance. As our military might is now more highly organized it has come to be an accepted practice for him to act as arbiter in disputes among commanders and to deputize trained officers to command the different spheres of military operations. This operates as a check upon the personal ambitions of unscrupulous military leaders who otherwise might aspire to the office of dictator and, backed by bayonets at their disposal, attempt a *coup d'état* to finish repub-

lican democracy. Realizing that the Ship of State might veer from its true constitutional course if freak military winds were applied to its sails the Founding Fathers took these steps to safeguard the Republic. The limits they placed on executive power were planned to prevent dictatorship. They planned wisely. (See Art. IV, Sec. 10 of *Hamilton's First Plan of Government* and *The Federalist*, No. 74.)

It were a novel concept that the Chief Executive, either in his civil capacity as President or in his military capacity as Commander-in-Chief might treat civilians as being subject to his rule without Constitutional or Congressional authority. It were novel, indeed, were the existence of a state of war which vests in him the disposition of the military power would vest in him unlimited power and control over civilian activities and properties and enable him to delegate these powers either expressly or impliedly to his subordinates. No such power is conferred upon him for such would amount to an outright suspension of the Constitution. No such power has been conferred upon him by Congress for such would amount to a delegation of power not lodged in Congress and, in effect, would constitute an abandonment of its constitutional duties and automatically elevate the Commander-in-Chief to the position of dictator and his military commanders to feudal chieftans. If the Commander-in-Chief had any such power over civilians there would be nothing to prevent him from commanding all voters to vote for him at the coming election and, in the event of disobedience to his com-

mand, to imprison the disobedient in concentration camps or have them shot in manner following the Nazis. The only method of prevention of such occurrences would be the constitutional power to impeach him which could be circumvented by like treatment or by ordering them enrolled in the military forces. We hope America never reaches such a state. In neither capacity is the President the "ruler" of the American people. What he is not permitted to do no military commander may do with impunity. The sufferings of 1775-1781 were a hollow mockery were our Courts to allow military power to override civilian right upon the pretext offered by an obscure military commander that a spurious military necessity called for a suspension or destruction of all the constitutional rights and liberties of a segment of our citizenry upon an ancestral origin basis.

Protection against espionage and sabotage in civilian ranks is a civil duty lodged in the Department of Justice. The military authorities have the right lodged in them by Congress under constitutional sanction to try offenders in the armed forces for certain specified offenses committed on military reservations, but the majority of crimes committed by military personnel are triable only in the federal and state Courts. The only exceptions are offenses triable by martial law tribunals. Citizens outside a theater of war are not triable by military tribunals. (*Ex. Parte Milligan*, 4 Wall. (U. S.) 2.) Protection against espionage and sabotage in civilian ranks is not a military function. If a military commander may usurp these functions he

might as well take over the general police functions of the civil authorities and arrest and try civilians for vagrancy and other civil offenses. If a military commander, with or without presidential or congressional consent, can take over these duties and do these things with impunity we may as well acknowledge that our government has ceased to be a republic under a constitutional form and admit that even the pretense no longer is apparent and that what we have is a dictatorship distinct from the European and Asiatic types only in the hollow form that is held up to public gaze. Is war power to be regarded as a shallow excuse to hide the fact of dictatorship? Are Congress, the Courts and the Nation so impotent they are to be deemed parts of the tail to a military commander's kite either in war or in peace?

II.

THE CONGRESS NEITHER AUTHORIZED NOR APPROVED THE PROGRAM.

Public Law No. 503 was enacted on March 21, 1942. It was designed to be the enforcement machinery for military orders which might be issued to exclude certain individuals from limited military areas immediately encompassing national defense materials, premises and utilities. No exclusion order had been issued at the time, the first issuing thereafter on March 24, 1942, covering a removal of persons from a small area containing defense installations. Apparently, therefore, Congress and the President who approved

the statute understood that it was to be used for this limited purpose. They did not dream that General DeWitt would utilize it to put into operation an indiscriminate mass evacuation and imprisonment of a segment of our citizenry from a states-embracing military area upon an ancestral basis without affording the affected citizens a hearing on the question of the necessity of their removal.[16]

In this statute Congress did not confer an unlimited authority upon the military commander to set up extensive military areas of a states-embracing nature in which his authority over civilians was to be unrestricted. It delegated no such power to the President. It did not authorize the military commander to select citizens upon an ancestral basis for removal from military areas, to segregate and quarantine them and to detain them in concentration camps. It did not give him military custody of these people or mili-

[16] When the proposed bill was pending in the House and Senate it was stressed that it was intended to apply only to the removal of certain individuals from limited areas. See letter of March 9 of the Secretary of War to the Speaker of the House, H.R. 2124, p. 167; U. S. Code Cong. Serv. No. 3, p. 2544; and his letter of March 14, 1942, to the House Committee on Military Affairs stressing the proposed statute was for the purpose of enforcing "curfews and other restrictions" with respect to persons. H.R. 2124, p. 168; H.R. 1906, March 17, 1942. This limited purpose of the proposed legislation was emphasized. See 88 Cong. Rec. part 2, pp. 2772-2775; H.R. 1906, pp. 2-3. Neither branch of Congress appears to have been informed that it would be used to compel an indiscriminate mass banishment and imprisonment of citizens on a race basis so as to render it a bill of attainder. If this evacuation of citizens was not inspired solely by reasons of prejudice against Americans of Japanese lineage why were Congress and the President kept in the dark as to the facts that the statute and presidential order were to be used to cause their mass banishment and detention?

tary jurisdiction over them. It delegated no such power to the President or to any military commander. Public Law No. 503 did not constitute a ratification of any such power to be wielded under Executive Order No. 9066 or authorize the President to exercise any such control over them. Neither the presidential order, if it can be said to authorize the issuance of discriminatory exclusion orders, nor the exclusion orders were ratified by the statute insofar as they pertain to citizens.[17] Civilian Exclusion Order No. 34 was issued 43 days after the statute was passed. Ratification validates prior but not subsequent executive action. Even prior executive acts cannot be validated by congressional legislation when they involve the destruction of fundamental constitutional rights. (See rules in *Swayne & Hoyt v. U. S.*, 300 U. S. 297, and *Graham v. Goodcell*, 282 U. S. 409.)

Civilian Exclusion Order No. 34 issued on May 3, 1942, that is, 43 days after the statute was enacted. It commanded the appellant to be ready for evacuation on May 9th, that is, 49 days after the passage of the statute. The statute does not incorporate this order by reference and could not for the order was not then formulated except, perhaps, in the brain of General

[17] The passage of statutes appropriating funds to house and care for the evacuees does not operate as a ratification of the banishing and imprisoning orders. The appropriation of funds to maintain our jails does not operate as a ratification of the facts and laws under which convicts are incarcerated. If it did, prisoners wrongfully convicted and restrained of their liberty would have no redress either by appeal or by writ of habeas corpus. Such statutes, so construed, would violate the prohibition against *ex post facto* laws set up in Section 9 of Article I of the Constitution. See *Viereck v. U. S.*, 318 U. S. 236.

DeWitt. If it were arguable that it was passed with the intent to incorporate an unknown exclusion order dependent upon his whim it is void for uncertainty under the well-settled rule of law that an Act which purports to adopt provisions which may or may not be enacted *in futuro* is void for uncertainty. (*Ex parte Burke*, 190 Cal. 326, 328; *Rose v. U. S.*, 274 Fed. 245, cert. den. 259 U. S. 655; 59 *Corpus Juris* 618, sec. 174 (3).) It would not enable it to be known what was commanded or forbidden. The statute mentions military areas prescribed or to be prescribed in the future but leaves them undescribed. It mentions unknown restrictions that may or may not be declared *in futuro* to be applicable to civilians therein through the medium of military orders not *in esse*. Consequently, it is unconstitutional and void for being vague, indefinite and uncertain in that it fails to prescribe any military areas by description and fails to specify any specific restrictions upon the activities of any person therein.

An examination of the statute reveals that it does not delegate to the President or to any military commander an authority to prescribe military areas or to restrict the activities of any citizen therein. It does not set up any standards, guides or policy for a military commander to follow or to which he is to conform. These are necessary conditions precedent to enable an executive or military officer to wield a *limited discretionary authority* in the enforcement of congressional legislation. (*Schechter Poultry Corp. v. U. S.*, 295 U. S. 495; *Panama Refining Co. v. Ryan*,

293 U. S. 388.) The military orders involved herein were expressions of legislative power usurped in violation of Article I of the Constitution. They are void as products of legislative power lodged exclusively in Congress.

Even if the statute be read in conjunction with Executive Order No. 9066 this defect is not cured. Neither sets up any standards, guides or policy for a military commander to conform to or to follow. This failure did not lodge unlimited or arbitrary authority in General DeWitt's hands to be wielded as caprice might dictate. Even though they were construed in the *Hirabayashi* case to uphold a curfew discriminating against citizens on a racial basis, for a limited period of time as an emergency war measure under the peculiar set of circumstances assumed in that opinion to have existed, the statute and presidential order would not seem to have been designed to enable banishment and imprisonment to be inflicted upon citizens. The Constitution is not suspended by the existence of a state of war. Extra-constitutional powers may not be wielded by divisions of our government. General DeWitt's program struck at the very roots of fundamental constitutional rights and liberties. The whole of his program was unlawful in conception and execution.

III.

CONSTITUTIONAL RIGHTS VIOLATED.

The statute, Public Law No. 503, was applied as the enforcement machinery for Civilian Exclusion Order No. 34, the military proclamations and orders which were designed and scheduled to banish the appellant and similarly situated citizens from the Pacific Coast and to imprison them in concentration camps. The purpose to which the statute, proclamations and orders was put, insofar as they affected the appellant and other American citizens, was unlawful from its inception. The consequent curtailment of the appellant's liberties and the deprivation of his rights of national and state citizenship are irreparable. As applied to the citizen appellant the statute and the military proclamations and orders to which it gave effect are unconstitutional and void upon the following grounds:

1. For delegating to military commanders, Courts and juries the legislative power to determine what are military areas and what acts or omissions therein on the part of the appellant shall be deemed criminal in nature and punishable, in violation of Section 1 of Article I of the Constitution. (*U. S. v. L. Cohen Grocery Co.*, 225 U. S. 81.)

2. For delegating unlimited judicial power to a military commander to function in lieu of Courts by enabling him to hold, in the recesses of his own mind, a mock trial of the citizen-appellant and other citizens of like stock, in an area free from martial rule and to condemn them to deportation and imprisonment on

mere suspicion or hearsay or simply because he harbors prejudice against them because of their Japanese ancestry, in violation of Section 1 of Article III of the Constitution. (*Ex parte Milligan*, supra.).

3. As constituting a bill of attainder forbidden by Section 9, clause 3 of Article I of the Constitution in that it aided, enabled and encouraged the military commander to banish him not for the commission of a crime but solely by reason of his type of ancestry. (*In re Yung Sing Hee*, 36 Fed. 437; 16 *Corpus Juris Sec.* 902-3.)

4. As aiding the military commander to seize his person without legal process and without probable cause in violation of the unreasonable search and seizure clause of the 4th Amendment.

5. As depriving him of the following, among other, inalienable rights of national and state citizenship in violation of the due process clause of the 5th Amendment. The "rights so vital to the maintenance of democratic institutions." (*Schneider v. Irvington*, 308 U. S. 147, 161.) The right of the citizen "to live and work where he will". (*Allgeyer v. Louisiana*, 165 U. S. 578, 589.) The right "to establish a home". (*Meyer v. Nebraska*, 262 U. S. 390, 399; *Colgate v. Harvey*, 269 U. S. 404.) The right to "freedom of movement". (*Williams v. Fears*, 179 U. S. 270, and concurring opinions in *Edwards v. California*, 314 U. S. 160.) See also the discussion of these rights in *Corfield v. Coryell*, 4 Wash. (U. S.) 371; *U. S. v. Cruikshank*, 92 U. S. 542, and *Holden v. Hardy*, 169 U. S. 366, 389.

6. As depriving him of his right to work and to the fruits of his labor without due process of law in violation of the 5th Amendment. These are property rights. (*Truax v. Raich*, 239 U. S. 33, 38.) Inasmuch as General DeWitt's orders assert that the deprivation of these property rights was necessitated for a public purpose the deprivation constituted a taking of private property for public purposes without just compensation in violation of the 5th Amendment. It is also to be noted that Public Proclamation No. 3 deprived the appellant of the possession of articles of personal property which the General characterized as contraband in his hands without, however, depriving white citizens in the same area of similar personalty.

7. In denying him the equal protection of the laws which is implicit in the due process clause of the 5th Amendment. (*U. S. v. Yount*, 267 Fed. 861; *Sims v. Rives*, 84 Fed. (2d) 874, cert. den. 298 U. S. 682.) Due process of law forbids racial discrimination. (*Yu Cong Eng v. Trinidad*, 271 U. S. 500, 528.) Although the equal protection clause does not appear in the 5th the legal significance of the due process clause in the 5th and 14th Amendments are identical. (*Heimer v. Donnan*, 285 U. S. 312; 16 *Corpus Juris Secundum* 1141.) The utter inequality which has been practiced herein would seem to violate the due process clause of the 5th Amendment for due process is synonymous with "law of the land" which, in America, cannot mean one law for one citizen and another for another citizen. The guaranty of due

process of law in the 5th Amendment was not originally designed to decrease but to expand the rights of a citizen.

8. As holding the appellant to answer for an infamous crime, the nature of which is unknown, in violation of the provisions of the 5th Amendment. Banishment is a type of infamous punishment forbidden by the 5th Amendment. (See *U. S. v. Moreland*, 258 U. S. 433.)

9. As subjecting him to deportation and internment without charging him with crime and without informing him of the nature and cause of any accusation against him and without affording him a fair trial on the question of the necessity and right to banish and intern him, in violation of the 6th Amendment. The denial of such a fair trial also violates the due process clause of the 5th Amendment. In issuing and enforcing his penal *lettres de cachet* against the appellant and similarly wronged citizens the General prejudged him and them in the secret recesses of his own mind and condemned them to deportation. Even if he is a self-appointed military tribunal no such power is lodged in him by the Constitution or by statute. (*Ex parte Milligan*, supra.)

10. As inflicting upon him the cruel and unusual punishment of banishment and internment in the absence of crime upon his part and without an accusation of wrongdoing being brought against him, in violation of the 8th Amendment. (See discussion by Mr. Justice Brewer in *U. S. v. Ju Toy*, 198 U. S. 253, 269-270; also see, *Ex parte Wilson*, 114 U. S. 417, 428.)

11. As imposing upon him in an internment camp a condition of slavery and involuntary servitude, imposed not for crime but solely by reason of his type of ancestry, which is forbidden by the 13th Amendment. (See *Slaughter-House Cases*, 83 U. S. 36.) In the W.R.A. camps the internees have been put to work assigned by the authorities in charge at peon wages. (See *W.R.A. Manual*, Chap. 50.5, paragraph .6-A et seq. As an unskilled person the appellant was scheduled to receive not more than $12 per month for devoting 8 hours per day to such labor.

12. As working a corruption of blood and forfeiture upon him, without trial, upon the theory of the constructive treason of his remote ancestors which is forbidden by Section 2, clause 2 of Article III of the Constitution. (*Shortridge v. Macon*, 22 Fed. Cas. No. 12,812; *Ex parte Bollman*, 4 Cranch 75, and 63 *Corpus Juris* 814.)

The conclusion seems inescapable that Congress did not authorize or approve the banishment and imprisonment of these citizens. It does not meddle in the programs of executive and military officials. It is powerless to take action against them except that it may impeach them or reduce their compensation. It is not part of its province to halt the action of military commanders or to encroach upon the executive and judicial fields. Although it is reluctant to criticize executive officers it is generally the butt for criticism from official sources. It does not intervene upon behalf of an abused citizenry. By legislation, however, it can provide compensation for injuries suffered, a duty it

yet must perform for the citizens who have been impowerished by General DeWitt's action taken against them under the pretext of color of authority of the United States.

Neither Congress nor the President were originally apprised that General DeWitt intended to evacuate all persons of Japanese ancestry on a wholesale basis. Neither of them nor any military commander is authorized to discriminate against these citizens on the basis of the nationality of their ancestors. If the due process clause of the 5th Amendment is to be used as a device to do this it is time we stopped teaching our children that the Constitution has any significance and that the Bill of Rights is a charter of our rights and liberties. We should tell them instead that arbitrary power is lodged in each Administration that captures or falls heir to the reins of government. If this terrible imprisonment program is valid we should call a Constitutional Convention to write another Constitution which will tell us the harsh truth.

There was no substantial basis for a belief upon General DeWitt's part that any threat of espionage or sabotage to our military resources from the appellant or any of these evacuated citizens was real or imminent or that he or they presented any clear and present danger to national security. Civilian exclusion orders issued against individuals have been held void upon the ground that at the time of their issuance there was not present a substantial basis for the judgment of a military commander that a threat of espionage or sabotage to our military resources was real and im-

ment. *Schueller v. Drum*, 51 Fed. Supp. 383; and *Ebel v. Drum*, 52 Fed. Supp. 189. That there never has been a threat of espionage or sabotage on the part of the appellant or upon the part of any of the similarly evacuated citizens and aliens is demonstrated by the facts that the General has never accused one person of any such acts and that none of these people has ever been charged with the commission of any such acts, although opportunities were available if any were bent upon such acts.

The General prejudged these people *en masse* and sought their banishment from the Pacific Coast. That his whole brutal evacuation program was the result of his personal prejudice against them and not in anywise based upon any facts whatsoever that would form a rational basis for this program appears from an examination of his *Final Report* on the subject. His testimony before the House Naval Affairs Subcommittee on April 13, 1943, demonstrates his action was inspired by prejudice. See quotations from his testimony on page 33 of the appellant's petition for writ of certiorari herein. The persistent refusal of General DeWitt and his successors to revoke the exclusion orders for the deportees found to be loyal by the W.R.A. is evidence the motive that inspired their issuance was nothing but prejudice.

IV.

WHY MILITARY FORCE REPLACED CIVIL AUTHORITY.

It is significant that neither the President nor Congress has ever given any expression of approval of the evacuation program. Neither the proclamations nor the exclusion and detention orders of General DeWitt had a reasonable relation to the declared purposes of Executive Order No. 9066 or to national security. The presidential order was used as an excuse to cause the permanent banishment of these people from the Pacific Coast and the imprisonment of 73,000 citizens without cause to the everlasting disgrace of America. We assert that this program was not put into execution because of a bona fide military necessity conceived in good faith. The test whether military action transgressing civilian rights is justified is not whether it was conceived in good faith but whether it was conceived in good faith coupled with sound discretion and based upon solid and substantial facts demonstrating its imperative application for national security reasons. Is a military commander's assumed reputation for infallibility as to what is a military necessity of more importance than the rights of 73,000 citizens that a Court must accept his judgment as final without inquiring into the facts upon which the asserted necessity is based? Is good faith and sound judgment on the part of the General to be assumed and the good faith and loyalty of injured citizens to be doubted? General DeWitt's *Final Report* proves he had a passion for deeds but not for substantial facts.

Was General DeWitt so blind that he didn't realize that in the interval between December 7, 1941, and the date each of his unprecedented orders issued civilian boards of investigation could have examined into the loyalty of each of the prospective deportees if he didn't wish the Army to conduct them?[18] They could have been examined in less time than the months it took to build the shacks that were to house them. The inconvenience and cost of examining would have been trifling. The cost of the housing, evacuation and administration of his program has cost this country many millions. The loss of their services has been a national calamity. Did he flout civilian authorities because he believed they were incompetent and he alone competent to judge? Why did he keep secret the reasons he insisted upon this frenzied evacuation? How could this nation abide the secret reasons he carried in his head when we had neither evidence nor ground to believe him to have been the wisest man in the nation? What are the facts upon which he would justify the outrage he perpetrated? This Court no longer needs to resort to speculation as to what those

[18]The General issued several hundred individual civilian exclusion orders against "white" naturalized citizens of prior German and Italian allegiance, whom he deemed dangerous. These first were given individual hearings on the question of their loyalty by boards consisting of three Army officers. With a few exceptions these orders issued against naturalized citizens against whom the Attorney General later instigated denaturalization proceedings. The majority of these orders appears to have been revoked. If the General had time to provide examinations for these individuals can he be heard to deny he had time to examine Japanese descended citizens before evacuating them? His special treatment of these whites proves his bias against the native born yellow citizen.

reasons were, if reasons they can be termed, as it was impelled to do in its opinion in the *Hirabayashi* case which involved the validity of a curfew imposed upon alien enemies and citizens of Japanese descent in a military area. When that case and the *Yasui* case (*Yasui v. U. S.*, 320 U. S. 115) were argued the General had not made known his reasons. He left it to judicial hypothesis to discover grounds to justify his assertion that a bona fide military necessity existed for his action. We find what he offers in lieu of reasons in his "*Final Report*"[19] on the Japanese evacuation from the West Coast first made public on January 19, 1944, two years after the evacuation was completed. His strange silence for this period is explainable on no grounds except prejudice against these deportees. The document asserts his military excesses are to be ascribed to his astuteness and sagacity, products of reason. His report demonstrates them to have been born of bias and war hysteria, products of emotion. What he offers therein does not permit an honest conclusion that his revolting program was based upon an exercise of sound discretion and mature judgment. It proves the prattle of military necessity was medicine he wished the public to swallow, prescribed for a non-existent disease. The public hypnosis that followed his punitive orders was caused by fear of invoking military wrath. The silence of

[19]This is not an official government report. It is a self-serving document of a subordinate general to his superior officer offered in anticipatory defense to expected charges of wrongful action. It never has been submitted to the Attorney General or to the President for approval and has never been officially approved

the victims was caused by fear that military reprisals might be taken against them. The program was inspired by prejudice, the fierce tyranny of prejudice of the military commander and nothing else. We were intellectually dishonest were we to deny the fact.

Oppression is not excused by presuming the General acted in good faith. Such would be tantamount to presuming that the oppressed were guilty of conduct justifying arbitrary military action against them, that is, that they were guilty of criminal acts which necessitated the use of military force against them. It is never "good faith" that is justification. Good faith has caused the extermination of too many millions of innocents during the past 6000 years. It is usually an excuse offered to save the reputation of evil doers. Thousands of good citizens have been impoverished and thousands of innocent lives have been ruined by General DeWitt. His recklessness is not equivalent to good faith. There may be a few who smirk over the irreparable injuries suffered by these people but those who do never have understood and never will understand that this Republic stands for equality in the treatment of its citizens.

Prejudice inspired the program.

In this fantastic colored report he informs us his frantic program was carried into execution simply because he entertained a belief that the "distribution of the Japanese population" on the Pacific Coast "appeared to manifest something more than coincidence." His statement is pregnant with unmeaning

ful not to our security but to the conscience of this nation. We are to infer that he attributes a sinister meaning to this distribution. It is evident, however, that he is unfamiliar with the history of these people on the Pacific Coast. From this peculiar manifestation, which seems to have been limited to him alone of all our military commanders, he drew the conclusion that this population was "ideally situated with reference to points of strategic importance, to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so." (See p. 10.) On page vii he states that 115,000 persons of Japanese ancestry resided along the Pacific Coast and "were significantly concentrated near many highly sensitive installations essential to the war effort." His suspicions evidently are confined to these people whether alien or citizen.[20] He entertained no like suspicion of German and Italian nationals and their issue in the areas which is peculiar to say the least. Did he think we had everything to fear from these people and nothing from the fascist and nazi-minded alien zealots here and their "white" sympathizers? Nothing in his report in anywise substantiates the existence of a clear and present or potential danger to our military and defense resources from citizens of Japanese pedigree or from the aliens who were evacuated. The most that can be gleaned from his report is that he con-

[20]The tens of thousands of white neighbors and friends who visited these people in the assembly centers seems to be ample proof that those who knew them best did not view them in the same sinister light as General DeWitt and various the

ceived of a disease, prescribed a radical remedy and when the patients had passed out he searched about for facts and reasons to render a diagnosis. If it hadn't been for the General's announcement that he intended a generalized evacuation of these people there would not have been a Japanese problem at all. The announcement of his prospective venture into injustice created the problem and many witnesses rushed into the Tolan Committee hearings to voice their suddenly discovered *suspicions* of these people. The ignorant and the prejudiced are quick to see an enemy in their neighbor when someone first has attached the label.

Evidently he expected substantive rights to be surrendered while the crust of procedural right was to be preserved to the affected citizens in the form of applications for redress to courts as a useless process to be followed to satisfy legal formalism. Apparently he believed our Courts, by a resort to legal gymnastics, would supply a factual foundation to support his deportation and detention orders. This must have been based upon the fallacious notion that in time of war a military commander's action is above criticism and beyond review. Apparently he was not familiar with the decision in *Sterling v. Constantin*, 287 U. S. 378, 399, wherein this Court declared that "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." Did he expect a military blunder of magnitude to be justified by a Court on the fiction that an executive official as a subdivision of the executive branch of government can do no wrong?

Did he not realize that a citizen's rights in America are not dependent upon the slant of his eyes, the color of his skin, the religion he professes, or the nationality of his ancestors?

When the agitation on the Pacific Coast against the Chinese reached its height Japanese workers were imported by the white farming elements to displace Chinese workers.[21] They came by invitation and solicitation and were welcomed by the whites as a source of cheap labor. The newcomers settled in agricultural and fishing areas where their services were needed and where they could follow the occupations in which they were experienced. In these areas a majority of them remained, their native-born children gradually emancipating themselves from the pursuits of their parents. When first they settled here their residential sections, habitations and social orbits were prescribed by their employers and by the social tabus of their "superior" neighboring whites. By dint of hard work and ceaseless energy a majority of them surmounted the environmental difficulties which had hedged them in and, in due course of time, many were able to move into industrial, commercial and professional fields and appreciably bettered their financial standing and social status. It is significant that on their arrival the areas recently prescribed as military areas contained no installations, equipment or materials then considered to be of a national defense nature. Sections 101, 102, 104 and 105 of Title 50, U. S. Code, were not then even

[21] See Cross, Ira B., "History of the Labor Movement in California", an excellent historical summary in H. Res. 2124, p. 59 et seq.

in a state of contemplation but were enacted many years later, in 1918. The General has mistaken symptoms, easily explained and wholly familiar to those acquainted with the history of the Pacific Coast, for a disease which had no existence outside his own mind.

It never occurred to him that the labor of these deportees was national defense material with which he recklessly dispensed. His conclusion that the distribution of these people on the Pacific Coast "appeared to manifest something more than coincidence" was a spectre of his own creation. His qualified conclusion that these people were ideally situated to embark upon a tremendous program of sabotage "should any considerable number of them have been inclined to do so" is an hypothesis based entirely upon prejudice and base suspicion. It is an escape from fact and reality. Suffice to say that it was and is the duty of our civil authorities and not of General DeWitt to guard us against criminal acts upon the part of subversive persons within civilian ranks.[22] These authorities have been competent and faithful in the performance of their duties. Both by training and experience they were better able to cope with the problem than General DeWitt whose interference with their duties was not solicited but was

[22] General DeWitt has never arrested one person proved to be guilty of any such crime. The remarkable record of the F.B.I. is adequate proof of its ability to control subversive activities. It was reserved for General DeWitt, however, to interfere with the Department of Justice in June, 1942, in allowing German and Italian alien enemies to return to the West Coast areas from which they had been excluded by the Attorney General.

resented. They did not call upon him or the W.R.A. to usurp their functions or to police the civilian population of the Western States. Neither did the public. It is significant that not one authentic case of espionage or sabotage upon the part of any of these evacuated citizens or aliens occurred prior to their involuntary removal or since.[23] General DeWitt must have been aware of this but, despite the fact, he proceeded apace brooking no opposition so determined was he on their banishment. Had any acts of espionage or sabotage to our national defense material, premises or utilities, as defined in 50 USCA, Section 104, been committed those guilty would have been punishable by 30 years' imprisonment in a federal penitentiary and a $10,000 fine under Section 102 or by a like sum and 10 years under Section 105. A conspiracy to commit any such crime would have fetched 2 years' imprisonment and $10,000 fine under 18

[23]This is a fact too well settled to admit of dispute or doubt. See dissenting opinion of Denman, C.J., R. 42, pointing out that the government admitted "that not one of these 70,000 Japanese descended citizen deportees had filed against him in any Federal Court of this circuit an indictment or information charging espionage, sabotage, or other treasonable act" during the period from December 7, 1941, to May 10, 1942. The Tolan Committee Report, H.R. 2124, pp. 49-59, proves no such acts had been committed in Hawaii. Colonel Kendall J. Fielder, who had charge of military intelligence of the U. S. Army in Hawaii, in a letter to Mr. Charles L. Loomis dated May 17, 1943, states, "Having been in charge of military intelligence activities since June, 1941, I am in a position to know what has happened. There have been no known acts of sabotage, espionage or fifth column activities committed by the Japanese in Hawaii either on or subsequent to December 7, 1941." See record on appeal in the Circuit Court of Appeals for the Ninth Circuit, in *Duncan v. Kahanamoku*, Case No. 10,763, page 687. The Roberts' Report, Sen. Doc. No. 159, 77th Cong., 2nd Sess. 1942, does not charge any citizen or alien resident with disloyal acts. It charges alien spies attached to the Japanese consular offices with espionage. (See pps. 12-13)

USCA, Section 88. In addition, criminals guilty of disloyal acts could be punished for sedition (50 USCA, 33, 34) and treason (18 USCA, 1, 2). Adequate punishment can be inflicted by our civil Courts after trials wherein due process of law is safeguarded and where the accused or suspected person has an opportunity to prove his innocence. The penalties attaching to such prohibited acts are adequate deterrents to crime.

Had any of these deportees actually been suspected of the commission of any of these crimes or of a conspiracy to commit any such crime they ought to have been charged therewith and to have suffered trial thereon by our Civil Courts and upon conviction have suffered a severe punishment commensurate with the gravity of the offense. Without any such accusation a whole body of persons indiscriminately was picked up under General DeWitt's orders and was confined to concentration camps where scarcely any intelligent attempt has been made to segregate those loyal from those actually disloyal or the criminal from the innocent. The brand of possible disloyalty which the W.R.A. attaches to a few who are confined to the Tule Lake Segregation Center is an arbitrary classification given to all deportees to whom it denies leave clearances, the denials being made for the shallowest type of reason. In a high-handed fashion it has segregated those whom it would impliedly classify as disloyal upon secret evidence without hearing. (See *W.R.A. Manual*, Chaps. 110 and 60.10.) The General and the W.R.A. would have us believe they went on a tiger hunt but the only trophies they exhibit are a few rabbit skins.

The subterfuge of military necessity exposed.

What one day will be celebrated as a masterpiece of illogic but, which is corroborative evidence this frenzied banishment was based upon prejudice appears in General DeWitt's letter of February 14, 1942, to the Secretary of War, one month and a half before the evacuation commenced. (*Final Report*, p. 34.) He characterizes all our Japanese as subversive in this letter by referring to the subject of "Evacuation of Japanese and other Subversive Persons from the Pacific Coast". He states in the context thereof that "the Japanese race is an enemy race" and the native-born are citizens and "Americanized", their "racial strains are undiluted" and being "barred from assimilation by convention" may "turn against this nation" upon which he concludes:

> "It; therefore, follows that long the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

It is amusing as well as tragic to learn that he considers innocence to be an indication of brewing crime. He sheds no light on these apparitional "indications". Can it be said that his own statements as to what inspired him to order this banishment in anywise suggests he was actuated by proper motives or that it was based upon an exercise of sound discretion and

mature judgment? Certainly it was not the action taken by him that explains the absence of espionage and sabotage upon the part of these deportees—it was the innate loyalty of these citizens and the friendly attitude of the aliens that accounts for it. Opportunities were available for the commission of hostile acts before and after the evacuation took place had any desired to commit them. He doesn't accuse them of being unloyal or disloyal which might be exemplified merely by harboring thoughts. He accuses them of being openly or covertly hostile and consequently ready and capable of overt treasonable acts against our security. His suspicions are purely imaginative. We do not hesitate to state that never did a Nazi official in Germany draw more unjust conclusions than General DeWitt who would punish these people not for harboring dangerous thoughts but for thoughts he would imbute to them or project into their minds. He did not order German and Italian nationals and their native-born offspring driven from homes and imprisoned—their numbers are legion, therefore, he must have concluded that their numerical strength guaranteed their loyalty, a strange conclusion. Moreover, the government of no modern civilized country dares to transport millions of its inhabitants into exile—the political repercussions in a democracy would remove an administration from office, probably without relying on ballots. An unorganized minority is always the object of oppression. In Germany it was Jews. Here it is Americans whose ancestors were Japanese subjects.

General DeWitt adjudged these people guilty by his suspicion that they might have associated with a few persons in their midst who might have harbored dangerous thoughts against this nation. Individual guilt is the test for a deprivation of rights. (*Ex parte Quirin*, 317 U. S. 1.) Apparently guilt by possible association with unidentified persons of possible criminal tendencies arising out of possible ethnic affiliation is a new type of crime. It was made so by General DeWitt. Has he taken over the duties of Congress? He pronounced them guilty and imposed punishment. Has he taken over the duties of the Courts?

He has the temerity to declare these people were traitors to this nation. Why doesn't he tell this to the 100th Infantry Battalion—to the 442nd Combat Team—to the wounded—to those American youths of Japanese ancestry who have died that America might survive? All America and our Allies are grateful to these youthful warriors except, apparently, General DeWitt and a scattered few others whose prejudice blinds what reason they possess.

He tells us on page 18 of his report that there "were many evidences of the successful communication of information to the enemy, information regarding positive knowledge on his part of our installations". He doesn't tell us who communicated this information, however, or when it was communicated. He states that the "most striking illustrations of this are found in three of the several incidents of enemy attacks on West Coast points". These incidents he recites in his

list are as follows: (1) On February 23, 1942, an unidentified submarine shelled a hill near Goleta, Santa Barbara County, California, without damaging any vital installation, this occurring at a time a shore battery was in the process of replacement. Nothing is said about negligence in leaving the spot undefended while replacing the battery or why our planes failed to put in an appearance and sink the submarine. (2) On an unspecified date what is suspected might have been an enemy submarine-based plane might have dropped incendiary bombs in an obscure Oregon area where a forest fire might have been started. This, we are told, occurred in the only section of the Pacific Coast approachable by enemy aircraft without interception by aircraft warning devices. It would be peculiar that our enemies would attempt to start a forest fire by this amazing method when targets of much more importance might have been attacked. The report leaves much to be desired in the way of details and would seem to call for a more plausible explanation of the incident. (3) A hostile submarine shelled shore batteries at Astoria, Oregon, from the only place at which a surfaced submarine could approach the shore line close enough to shell coast defenses without being in range of coastal batteries. The date of this occurrence is left to surmise. It were strange indeed if our shore batteries at any point on our coast line did not have greater firing range than any guns an enemy submarine can carry. The public long has desired additional data on these reported incidents and long has

speculated on the announcements of their happenings and has never attributed any such occurrence to information communicated by any of our citizens or aliens to the enemy. The General had not the slightest evidence from which to infer that any of our citizens or Japanese aliens here were guilty of any such treasonable acts. It is to be noted that his report doesn't charge any Japanese alien or Japanese descended person with any such act either by direct statement, inference or innuendo. The recitation is an anomaly in his report.

In a footnote on page 8 of his report he informs us that after evacuation "interceptions of suspicious or unidentified radio signals and shore-to-ship signal lights were virtually eliminated and attacks on outbound shipping from West Coast ports appreciably reduced". He doesn't charge any alien or citizen of Japanese pedigree with signalling the enemy however. Had there been any signalling to the enemy by any person neither he nor the F.B.I. would have hesitated to arrest the guilty with or without search warrants and to have shot them or to have charged them with treason. No arrests were made. No one was shot. No charges were filed against anyone. A similar rumor of signalling which spread from Hawaii was proven to have no foundation in fact—on the West Coast the rumor rests on no firmer ground. It took time to convince the civilian public that black-outs and dim-outs were necessary precautions. General DeWitt had considerable difficulty putting these measures into operation. Full compliance was not obtained for some time

—but the delay encountered in convincing the public of the necessity for compliance with these measures is not to be construed as signalling to enemy ships. Perhaps the General's report confused this haphazard putting out of lights with signalling. He doesn't seem to have been aware, however, that in carrying out his evacuation program he put out the lamp of liberty. What prevented attacks upon our shipping off our coast was the appearance of a sufficient number of our airplanes on the West Coast and the setting up of an adequate off-shore patrol of naval craft and army planes. This vigilance has not relaxed. Detection of the presence of hostile craft by radar outmoded light signals.

The supposition that there were disloyal members among the ranks of these citizens whose numbers and strength could not be precisely and quickly ascertained would not justify the banishment and detention of a segment of our people. The same supposition may be applied to any portion of our population. It has no merit. There was ample time for General DeWitt to ascertain whether there were any disloyal persons in their ranks by Army hearing boards had he entertained a genuine belief in the presence of subversive persons bent on crime. He gave individual hearings to white naturalized citizens through Army boards he set up. A period of approximately four (4) months elapsed between December 7, 1941, and March 30, 1942, when the first evacuation took place. A period of five (5) months two (2) days elapsed up to May 9, 1942, which was the date the appellant was

ordered excluded from his home in Hayward, Alameda County, California, and into an assembly center. (See Civ. Exc. Order No. 34.) The last of the evacuees were not removed to an assembly center until the latter part of August, 1942. (See Civ. Exc. Order No. 108, 7 F.R. 6703.) The General exhibited not the slightest interest in having these people examined by Army boards—he was bent on their exile. Despite the fact that there was an ample and sincere public demand for the setting up of loyalty hearing-boards composed of civilians to determine the loyalty of these people, as the Tolan Committee Hearings prove (see H.R. 2124, pp. 28-30), the General turned a deaf ear to the proposals. He alone was to be the judge, jury and executer of his orders, a self-appointed one who thereby demonstrated his contempt for civil authorities and citizens' rights. Can a judicial tribunal assume that his attitude and action were the result of sound discretion and mature judgment? Can it be assumed judicially that the mere recital of military necessity in an order issued by a military commander affecting the rights and liberties of civilians in an area free from martial rule is indisputable evidence it was warranted by substantial facts?

A citizen's state of mind which might be characterized as *anloyal* wouldn't justify his banishment and detention and the brand of a criminal. Such a state of mind is negative and harmless to our security. A *disloyal* state of mind wouldn't justify such treatment because such a mental state, although denoting

dissatisfaction with our government and aims, is of a negative type and not a menace to our security. One, however, who is *hostile* to us and, in pursuance of his hostility, engages in overt acts presents a clear and present danger to our security and is triable for crime in our duly constituted Courts. A charge of *potential* unloyalty, disloyalty or hostility is based upon suspicion and prejudice. It is purely hypothetical—it would not justify a trial or mistreatment. It would pave the way for the grossest type of abuse. This is the sort of thing with which we are dealing.

We are not willing to trust all of our traditional constitutional rights to any military commander. We are not willing to vest in General DeWitt the right to determine who shall and who shall not enjoy the privileges and immunities of national citizenship. He is not infallible. A military man may be an authority on military matters but when he invades the domain of civil right he is usually in a maze. The American public does not worship at the shrine of any man. The banishment program was the product of the outright personal prejudice of General DeWitt against these people probably mixed with a vague suspicion he entertained of them based upon gross hearsay. Neither prejudice, suspicion nor belief in hearsay affords a rational basis for his constitution-destroying orders. The professional military mind notoriously holds civilians in contempt—it has been so during the ages and this is the chief reason why this republic was founded upon the theory that the military was subordinate to the civil authority. (See *Declaration of*

Independence, par. 14.) Whenever military orders clash with civilian right they must be scrutinized with the greatest of care and zealousness to protect the civilian against unjust encroachment. Must we stamp approval on military measures that oppress a minority of our citizens and satisfy our consciences by justifying it under the nebulous excuse that it was an expression of the war power? Injury is not excused by attaching to it a convenient but apologetic label. The military appetite is never satiated and seldom appeased where power is concerned.

In the Hawaiian Islands not one act of disloyalty has been charged to any of the Japanese inhabitants. A curfew regulation there was applied to all inhabitants without discrimination. Neither mass banishment nor internment was inflicted on citizens under the guise of a protective measure against threats of espionage, sabotage or other treasonable acts. Hawaii, it must be remembered, is an immense arsenal containing formidable military and naval installations and facilities for the production of defense equipment on a proportionate scale unmatched on the Pacific Coast. For a period of time, until June, 1942, when the battle of Midway was won, it was considered in danger of invasion attempts. Nevertheless, in the exercise of sound judgment and discretion our military and naval commanders there found no good reason to discriminate against citizens of Japanese ancestry or against Japanese aliens who made up 38 per cent of the population. General Robert C. Richardson, Commander Hawaiian Department, has

declared that the loyalty of the Japanese population in Hawaii has been "proved on innumerable occasions". (See record in *Duncan v. Kahanamoku*, appeal No. 10,763, U. S. Cir. Ct. Apps., 9th Circuit, p. 664.) Their loyalty is demonstrated by the fact that in March, 1944, there were employed in work on military installations in Hawaii some 6678 citizens of Japanese ancestry and some 743 Japanese aliens and on Navy projects 585 citizens of Japanese ancestry. (Ib. p. 1162.)

Can it be said that General DeWitt, in charge of military areas on the Pacific Coast which was not within a theater of war and which had not been in danger of invasion, had a rational basis for his arbitrary orders commanding the banishment and imprisonment of loyal citizens against whom not one accusation of crime was or could be made? Martial rule has prevailed in Hawaii ever since December 7, 1941. It was invoked under Section 67 of the Organic Act of Hawaii. (48 USCA, Sec. 532.) Whether it was properly invoked and is lawfully continued in force has not yet been finally determined. Martial law has never been proclaimed by Congress and martial rule has not prevailed on any part of the mainland United States. The reasonably prudent commanders in charge of our security in the battle zones and theaters of operation in the Central, South and Western Pacific areas saw no reason to discriminate against citizens of Japanese origin, but General DeWitt would discriminate against them in a military department far removed from the scene of active hos-

tilities and ask us to accept his judgment as final on the question of its necessity. Can it be doubted his orders emanated from his prejudice or unreasonable suspicion unsupported by facts?

On pages 105-106 of his report he asserts his reasons for ending "voluntary evacuation" and substituting "controlled evacuation" were (1) "to alleviate tension and prevent incidents involving violence between Japanese migrants and others" and (2) "to insure an orderly, supervised, and thoroughly controlled evacuation with adequate provision for the protection of the persons of evacuees as well as their property". However, it is a matter of common knowledge that there was no public tension constituting a menace to the security of these people and his program hasn't developed any, a few jingoist press rumors to the contrary notwithstanding. No overt lawless acts were committed against any of these people and no "incidents involving violence between Japanese migrants and others" had occurred. The illustrations to which he refers us to show the extent "to which vigilante activities were developing" is the Tolan Committee Report, Part 29, consisting of mere statements of four (4) persons protesting against dumping evacuees in small communities. Obviously protests would arise upon dumping evacuees upon small communities unprepared to house them and provide work for them for such would dislocate the economic and political structure of the communities. The public tension he refers us to seems to be the

tribulation of "an aged Issei couple and their family" in Santa Fe, New Mexico (outside DeWitt's department), where the "racial prejudice against the Hayakawas was so severe that the family petitioned Wartime Civil Control Administration requesting that they be permitted to join the evacuees assembled at Tanforan".

He cites the *Hayakawa* case as a lone example. The Hayakawas, *if possessed of means,* would have been welcomed in almost any mid-western and eastern locality where Japanese aliens and their native-born offspring have not been molested and where they have steadily devoted their efforts to the production of commodities and services in our war effort.

His solicitude for the property of these "evacuees" first found expression on March 13, 1942. (H.R. 2124, p. 182.) This occurred sometime after the majority of these "evacuees" had lost their properties to those human hyenas who preyed on their previously announced misfortune and profited by the predicament which had befallen them. The storage of "evacuees" property at the risk of the evacuees provided for in the "instructions" attached to each civilian exclusion order doesn't suggest much interest was wasted on "evacuees" property.

His arbitrary exclusion orders were applied even to American soldiers of Japanese ancestry who, while on furlough and in uniform, attempted to visit their families in the assembly and relocation centers. A few of these soldiers were arrested and removed from

the forbidden areas. Did this mistreatment of loyal soldiers indicate a genuine suspicion of them or mere prejudice on his part? On April 19, 1943, in obedience to instructions from the War Department, he was compelled to rescind his orders as to them and to permit them an unrestricted freedom of movement within his departmental command. (See Pub. Proc. No. 17.) He would not even make exception of those families who had their sons in service or of those who were veterans of the first World War.

Great care was exercised in the compilation of this *Final Report* that neither the written material nor the pictorial summary would reveal the presence of the armed guards patrolling the outskirts of the concentration camps and the barbed wire enclosures. The studied endeavor to portray things as they are not could not have been inspired by a desire to give the public a true picture of life in these prisons. On page 444 we are treated to a picture of a guard in a watch tower at the Tanforan Assembly Center. The footnote there informs us the military police were responsible for a protective custody of the inmates in reciting they were stationed there for "the external security of the assembly centers". We would be led to believe also that guard towers were designed for fire detection purposes for it also recites "guard towers were erected at strategic points and a watch kept for fires and other dangers". Perhaps we are to believe that the guard appearing therein was not armed—his revolver is not shown. The pictorial representations would mislead us into the belief that life in these pens

was an approximation to Heaven. To the unfortunate evacuees, however, it has a bitter likeness to Hell.

General DeWitt is an able organizer. He demonstrated this while in charge of the Western Defense Command. He is now in France. On the field of battle he may write himself high in the annals of courage and merit fame. This will be a kind of immortality. It will not wipe out the wrong he did these citizens. It has been aptly pointed out by census analysis that the evacuation "was largely of old men, women and children". (See Harrop A. Freeman, "*Genealogy, Evacuation, and Law*" in 28 *Cornell Law Quarterly* at page 443 et seq.) All this without examining into their loyalty and without accusing them of crime. Would he persuade us that reasonably prudent persons expected these people to turn berserk and run amuck when each of these persons then had at least one family representative in our armed forces who was ready and willing to shed his blood in defense of this country? Would he have us believe that it was necessary to punish a population for what he would term a suspected possibility of the disloyalty of a few in their midst? Would he have us believe his program was the result of sound discretion and judgment when he did not single out one disloyal person, did not accuse one person of crime and when he failed to

[24] All the youths fit and qualified for military service have left these prisons for duty in the Army. Those now detained in these concentration camps are the aged, the infirm, timid women, infants and youths unqualified for military service and, therefore, according to the notions of the General and the W.R.A., fit only for imprisonment. There are many Gold Star mothers in each of the camps.

make any provision for their examination between December 7, 1941, and the time each of these exclusion orders issued, the last of which became effective in late August, 1942? His action seems to have been more the product of vindictiveness than of a genuine distrust of them. He has branded these, our people. He has held them up to public scorn. They hang their heads in shame although they are guiltless of wrong. He carries his head high. He is proud. He is guilty of the gravest wrong ever done to any of our citizens.[24a]

Christianity, Buddhism, Shintoism, and emperor-worship.

The General attributes a part of his distrust of these deportees to the religions they profess. He believes them to be Buddhists and Shintoists and, in consequence, emperor-worshippers. He appears, therefore, to be misinformed about these religions and their adherents. Had he been familiar with the facts he would have known that the majority of the deportees are Christians and united to us by a common religious bond.[25] Did he really believe these to be "potential" spies and saboteurs bent upon our destruction? Does he wish us to believe they are not assimi-

[24a]On December 4, 1942, when the last of the deportees had been lodged in a War Relocation Center, General DeWitt pinned a Distinguished Service Medal upon his chief-of-staff, Col. Bendetsen, for having had a hand in this banishment and imprisonment program that is for aiding in the deprivation of the constitutional rights of the deported citizens. No similar or comparable distinction has been shown the Attorney General for originally opposing the program, that is, for endeavoring to protect the constitutional rights of these citizens. Honor apparently does not always fall to the deserving.

[25]See H. Res. 113, p. 11,771; Strong E. K., "The Second Generation Japanese Problem", p. 254; H.R. 2124, p. 148.

lated into our national life because they profess Christianity which transcends racial barriers? A number of the aliens and citizens are followers of Prince Siddhartha who became the gentle Gautama and one of the line of Buddhas. Did he believe that Buddhism teaches its adherents to engage in espionage, sabotage and war? No one with the slightest respect for truth would state that it teaches anything but non-violence and resignation to fate and never the harboring of hatred or the commission of crime. The monotheistic faith of the Nichiren sect is scarcely distinguishable from Christianity. In none of its sects does Buddhism worship any emperor.

He suspects them also of being "potential" spies and saboteurs because Shintoists may be found within their ranks who worship the Japanese emperor as a God. If there be any among these people who profess faith in Shinto we must understand what this religion is before accusing them. It is sometimes called the national religion of Japan and is often confused with what may be termed emperor-worship by the advocates of untruth.[*] It has evolved from a primitive religion of great antiquity, the origin of which is lost in the mist of time but, like other great religions of earth, it has been subject to change and evolution. It has been modified by Buddhism, Taoism and other religions and philosophies. The name of the primitive religion of Japan is unknown. Buddhism

[*] In 1937 there were 111,739 Shinto shrines, 71,336 Buddhist temples and 1708 Christian churches in Japan, figures which throw doubt upon the truth of the oft repeated statement that Shinto is the national religion of Japan.

reached Japan in the sixth century, and the primitive religion then became known as Shinto, a name of Chinese origin. In the ninth century the two creeds were welded into a system of doctrine under the name of Ryobu Shinto (dual Shinto). The primitive religion has never been fully revived. See Vol. 15, Encyc. Brit., 11th Ed., p. 222, article on Japan, Religion. None of the great religions of the day have fully preserved their pristine glory. The church philosophers have modified them and changing environments have produced subtle changes in them. If it be true that Shinto has evolved from ancestor-worship it does not differ in this from the other great religions which smack of earth, but this is no reason why its adherents should be ashamed of its ancient practice.

On pages 11-12 of his "*Final Report*" the General suggests that these people are dangerous because Shintoists are ancestor-worshippers who worship the Japanese emperor. Like many others he appears to have succumbed to propaganda which was devised to implant just such thoughts in the public mind. It took seed in his, blossomed and produced strange fruit. The early inhabitants of the Japanese archipelago, Ainu, Asiatic and island invader of mixed blood strains, venerated their ancestors. So have and do most of the peoples of the earth. We see an exaggerated form of it in plebeians who, lacking a genealogical tree revealing patrician origin, for a modest price acquire portraits of distinguished personages whom they adopt as ancestors for conventional reasons. Frequently the desire of those who fear anony-

mity is satisfied by a projection into the past and fiction to acquire presentable pseudo-ancestors *nunc pro tunc* to render the possessors respectable and to lend them social prestige and make them socially acceptable. For a reasonable price, too, one may obtain the services of a scribbler to create an impressive line of ancestors, the printed word importing at least a *prima facie* respectability in one's line of ascent into the past. A substitute form of this longing is satisfied in others who achieve the appearance of importance when their names appear in one of the various "Who's Who" publications which seldom are read by any except those whose names are buried therein and which are about as bulky and interesting as the ordinary city telephone directory without, however, possessing the latter's accuracy. A variant of thise veneration is exemplied by Herr Schicklegruber who, born an Austrian with Napoleonic aspirations, desired and became, by his own orders, Herr Hitler, first citizen of Germany but, by his own will, a barbarian and an atavistic type of human. He demonstrated to the world his reverence for his spiritual ancestor when France fell by appearing in Paris to bow in reverence to the gloomy sarcophagus containing the mortal remnants of the Corsican oppressor. There are many who stalk and strut on earth in the belief they have a spiritual affinity to great conquerors of the past. There is no legal prohibition against the acquisition of a series of eminent ghosts, forbears or bones by adoption if one feels ashamed of his own provable ancestors. Neither our good Father Adam nor our

good Mother Eve will protest, knowing full well the nature of their line.

The sun-goddess Amaterasu whose shrine is at Ise had a grandson, Ninigi, whose great grandson was Kamu-Yamato-Iware-Biku (722-585 B.C.), the chieftan of a small family or clan who later was recognized as the first ruler of Yamato.[27] Fourteen centuries after his death when the land of Yamato had been extended to include a larger portion of the island of Honshu this ruler was given the name of Jimmu Tenno, a name signifying "ruler of divine-valour" and not, as propagandists would have us believe, "son of Heaven". The name Jimmu is posthumous and was invented during the reign of Kwammu (782-806 A.D.) and is a Chinese translation of the quality assigned to a ruler, and means "divine-valour", the Chinese word "Tenno" signifying "ruler".[28] The Chinese ideographs for the name demonstrate that the ruler reigns in an area on earth, that is, under the sign for Heaven, to distinguish it from a spiritual plane. It is evident, therefore, that Jimmu himself made no pretensions to divine descent or divine power. He might have been regarded a king during his time although not an emperor because his jurisdiction extended over only a portion of Honshu. Were he a deity he would not have rested content on learning that one of his descendants, by becoming an em

[27] See the Kojiki, compiled in 712 A.D., and the Nihongi, compiled in 720 A.D.

[28] See Encyclo. Brit., 11th Ed., Vol. 15, pp. 252-254, article by Capt. Frank Brinkley, R.N. on Japan, Domestic History

peror, had risen to a higher station than he had attained as a mere king. Divinity does not expand with the efflux of time.

With the ascendancy of the Shogunate to power the Mikado was forced into retirement at Kyoto and was relegated to a position of political unimportance. With its decline he was recalled to Yedo (now Tokyo) to assume the little political power the new order was willing to surrender. The fiction of divine descent, derived from myth, was revived by the politicians for political reasons but it was neither conceived nor accepted as an article of religious faith.[29] It could mislead only the illiterate, the ignorant and the dupes. In his political capacity the Mikado is accepted by his subjects as the Emperor of Japan and in his priestly capacity as the Chief Priest of Shinto. In neither does it appear that he claims divine descent or power. In neither is he worshipped as a divinity by his subjects, but, in his priestly capacity he is revered as is the Anglican Archbishop, the Roman Pope, the Moslem Caliph and other primates of religious institutions. Respect or reverence for leaders of religions is not to be confused with the adoration and worship reserved for deities. The Shintoists believe in an after-life and in a divine spirit, termed Zain, a tetragrammaton which, interpreted, signifies Supreme

[29] Arai Hakuseki and Ichikawa, the leading Japanese philosophers of the 17th century, dispelled the myth of the divine origin of the Imperial family; the latter, anticipating Darwin by more than a century, argued the ancestors of all men were animals. Brinkley, Capt. Frank, "Japan", Vol. V, pp 254. Durant, Will, "The Story of Civilization", p. 865.

Being or God. The Japanese emperor as the Chief Priest of Shinto is but a mere representative of the divine on earth in the same manner and to the same extent as other earthly primates. He is not considered an earthly divinity by osmotic process or by divine descent or election.

A few superficial authors who appreciate stories more than truth classify Shinto as ancestor-worship whereas the fact is it is nothing of the kind. In its rites and rituals it honors ancestors and its precepts teach respect and reverence for one's forbears, consequently, it may be characterized as teaching ancestor-respect or ancestor-reverence.[30] In this it does not differ from other earthly religions. In the Mosaic Code both Judaism and Christianity teach, "Honor thy Father and thy Mother", but the pious Jew and the pious Christian would not be inclined to recognize this as ancestor-worship or to identify it with ancestor-worship. Reverence for rulers and primates is characteristic of nearly all peoles. According to Japanese legends, all Japanese are god or dodess descended. It scarce could be expected that the descendants of one god would worship the descendants of another. No sensible Japanese national as a follower of Shinto views the Japanese sovereign either as a divinity or as divinely descended. The appellees cannot point to one American citizen of Japanese lineage as a Shintoist or as a believer in an emperor-cult. It is doubtful if they can point to any

[30] Moto-ori Norinaga. Kojikiden

followers of Shinto in this country except a few from among the ranks of those aliens who long have resided here. They cannot point out one feature of Shinto incompatible with loyalty to America. It has been a practice to hang pictures of Washington and Lincoln in Shinto temples in this country that devotees might pay respect to these emancipators. (H.Res. 113, p. 11,808.) The Christian who shuns as abhorrent the thought of being descended from a god nevertheless prides himself on being created in the image of God, not recognizing both views are presumptuous to say the least. No, what is miscalled "ancestor-worship" in Shinto is nothing but a quasi-traditional cult of ancestors, that is, of ancestors revered but not worshipped. It is connected with the Pythagorean idea of "repetition", the Buddhist idea of eternal "recurrence" and probably the whole theory was derived from the "reincarnation" belief of the cult of Krishna, a religion of Vedic origin. The projection of the personal ego into the future and hence eternity on a physical plane through the medium of children is a form of the same thing. Those who believe their own immortality is perpetuated in their own offspring reveal their doubts about the survival of their own souls, however. If they are successful in this world, however, many are quick to regard themselves as entitled to the credit of greatness to the exclusion of their ancestors and descendants.

State-Shinto.

Shintoism must not be confused with "State-Shinto," political-Shinto or Shinto-nationalism which is a modern nationalistic political movement in Japan sponsored by militarists bent upon establishing the supremacy of state-power with its leaders, of course, holding the reins of government. It is an apotheosis of state-power, the emperor, as a figure-head to whom political power is not, in fact, entrusted, being the symbol of the state. See H.Res. 113, pp. 11,808-11,811, testimony of Ronald L. Latimer, an American Buddhist priest, distinguishing State-Shinto from Buddhism and Shinto. It advocates the divine right to rule, a theory not altogether discarded by European emperors, kings and pretenders to thrones. Each of these singular persons refers to himself in the plural as "we" and asserts he reigns or is entitled to reign "by the Grace of God" but claims his title "by divine right." The common practice of those who are born or buy their admission into the ranks of the nobility prefix to their names the description "Lord," a practice suggesting who sports it is deemed to have derived it from a heavenly and not an earthly source. The appellees have no evidence of State-Shinto ever having been imported into the United States. We have a variant of it that is a native product. It is exemplified by a military commander who, presuming to act in the name of the state, oppresses citizens.

The apotheosis of a state, symbolized by a person, is not an uncommon historical event. Military heroes, proud of successes which they measured by the terror

they inspired in subjugated peoples, have elevated themselves from mere thrones they inherited or seized to positions of gods and commanded themselves to be worshipped. Alexander disavowed Philip as his father, claimed descent from Herakles and thereafter asserted he was a son of Jupiter Ammon. Julius Caesar claimed descent from Venus. The line of rulers following him established an emperor-cult. Caligula enrolled himself as a god. The deification of scholars, mystics and rulers has been common. Buddha, Kung Futze, Plato, Amenhotep IV, Hwang-ti, Al Ghazali, Apollonius of Tyana and Louis XIV, "*le roi soleil*," have been deified with official cults. The current "Songs of Lenin," the poems dedicated to him and the great treks to his granite mausoleum in the Red Square indicate the revolutionary hero is en route to deification. The "Heil Hitler" salutation is evidence the Nazi chieftan, while his star was ascendant, was scheduled for the same eminence. It is equivalent to "Ave Caesar" which had the significance of "Ave Dei." There are prominent persons at large who, not being averse to the honor, covet a comparable distinction. For some reason each generation seems to have divinities running about on earth. Fairly recent claimants to the dubious honor are the extraordinary Moses Guibbory, alias Jehovah the First and Last, etc., residence address, Cave of the Sanhedrin, Jerusalem, temporary whereabouts, New York City. (See "*The Bible in the Hands of Its Creators*," N.Y., 1943), and Father Divine, sometimes of New York City and, more recently, of Hyde Park. Mayhap these are signs or symbols or, perhaps, just symptoms.

Bushido.

The General also suspects these people because a few of them exhibit an interest in Bushido. (See *Final Report*, p. 11.). He does not seem to be well informed as to what this is. Bushido is simply an ethical code attempted to be engrafted on the modern Japanese warrior caste whether the warrior is *samurai* or *heimin* descended. It is a substitute for the samurai code of medieval Japan and a counterpart of the chivalric code characteristic of European nations in their feudal age when knighthood was in flower and before Cervantes put it to seed by publishing "Don Quixote" in 1605. It is derived from rules of conduct prescribed by feudal chieftans for their retainers. For example, see *Code of Kato Kiyomasa*. The General's report (p. 11) demonstrates that the bushido which occasioned him so much alarm consisted of teaching boys kendo, judo and sumo, i.e., fencing, jiujutsu and wrestling, excellent forms of physical culture which our Army prescribes for the training of youths in service. He has not informed us how these tend to convert a harmless youth into a spy or saboteur.

Assimilation.

In the *Hirabayashi* opinion this Court concluded that there was "support for the view that social, economic and political conditions" prevailing since the Japanese came to this country "have intensified their solidarity" and, in a measure, have "prevented their assimilation as an integral part of the white population." The aliens are ineligible to citizenship. *Ozawa*

v. U. S., 260 U.S. 178. This has prevented them from assimilation into our political activities but not from our social and economic life. The citizens are native born and participate in our political activities. Very few of the foreign born long would have remained aliens had we made them eligible to citizenship. None have been so eager as these for citizenship. The ships the Japanese government sent here to evacuate aliens in November, 1941, when war was imminent, returned to Japan with few passengers. It appears that those who took passage were not bona fide residents but aliens who had come here on business and pleasure trips. H. Res. 113, p. 11,452, 11,477. Our alien residents demonstrated their loyalty to the United States by remaining here with their citizen children in the country to which they are bound.[31] This was an expression of loyalty that all the absurd suspicion of them cannot erase. Miscegenation statutes such as Sections 60 and 69 of the California Civil Code prohibit the intermarriage of white persons with Mongolians, Malays and Negroes but marriages contracted between them in states where no such prohibitions exist are valid in the states where the miscegenation statutes are in effect. The prohibitions, therefore, are ineffective and the number of mixed marriages is on the increase. The birth of mulattoes and mongoloids is not to be attributed to a desire to preserve the

[31] Despite the treatment they have received, if the government today were to offer to transport the aliens and citizens who desired to leave, none of those imprisoned in the relocation centers would accept the offer and there would not be in excess of a dozen of the Tule Lake alien segregants who would accept the offer.

"purity of race" so dear to those who proposed and those who would defend these silly statutes. The constitutionality of these statutes in so far as applied to citizens is to be doubted. State legislation designed to prevent aliens ineligible to citizenship from owning agricultural land, such as the Alien Property Act of 1919, California General Laws, Act 261, which were the result of the Oriental-baiting Exclusion League's activity, in nowise affects the right of citizens born of Japanese parents from possessing title to land; consequently, the purpose of these statutes is largely defeated. Such legislation has no bearing on the assimilation of their citizen issue into our economic life.

This Court also assumed that there was relatively little social intercourse between these people and the white population and that the restriction of privileges and opportunities afforded persons of Japanese extraction "have been sources of irritation and may well have tended to increase their isolation and in many instances their attachments to Japan and its institutions." The Court erred in its assumption. These citizens have been reared in our communities, have attended the same public schools, have frequented the same places of amusement and have enjoyed the same entertainments. They have engaged in the same employments, businesses and professions. The aliens have enjoyed substantially the same privileges. The sources of irritation to which the Court refers were of an historical nature existing until the turn of the century; the isolation ceased at that time. The conclu-

sion of a possible attachment to Japan and its institutions is not borne out by facts. The aliens came here in the first instance to avoid the social, economic and political conditions they experienced in Japan. Our European ancestors settled here for like reasons. Neither they nor we should be ashamed of the poverty or misfortunes of our ancestors.

Even the incarceration of these people in W.R.A. concentration camps has not rendered them hostile to this nation. The implied classification of disloyal attached to the few citizens deposited in the Tule Lake Segregation Center is to be viewed with caution and doubt inasmuch as it is an arbitrary brand. The incarceration and its attendant impoverishment is not conducive to patriotism but it does not render these people disloyal. The blood the sons of these have shed in our defense on the battlefields of the Pacific, Sicily and Italy dispute the conclusion of attachment to Japan more eloquently than mere words.

Propaganda.

This Court's conclusion in the *Hirabayashi* case that the "association of influential Japanese residents with Japanese consulates has been deemed a ready means for the dissemination of propaganda and for the maintenance of the influence of the Japanese Government with the Japanese population in this country" does not seem to be warranted by the very authority cited. H.R. 1911, p. 17. That the alien males whose average age is now some 60 years (H.R. 2124, p. 95) and who had resided in this country for a period in excess of 20 years, ibid. 92) would have been guilty of circulat-

ing such propaganda taxes credulity. There is no doubt that Japanese consulates and associations spread propaganda (*Final Report*, p. 10), of a more or less innocuous type during the pre-war period but it was not directed against the United States. As propaganda it was ineffective—the loyalty of the American-born youth in this war demonstrates that quite conclusively. This country has been flooded for a good many years with Communist, Nazi and Fascist propaganda from consulates, foreign organizations and domestic organizations but it can be said that although the American public has been inoculated the vaccination has not taken. Propaganda addressed to youths of Japanese ancestry has not influenced them against this country. We are unable to discover any reliable evidence that propaganda from Japanese sources was designed or had the effect to turn these people against this nation.

The language schools.

The sending of children to Japanese language schools after regular school hours is just as harmless as sending children to supplementary schools to learn any of the European tongues. Some suspicion has been aroused over the existence of these schools. The ignorant always slander and would suppress what they do not comprehend. This Court stated in the *Hirabayashi* opinion that "some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan." Suspicion on the part of persons wholly unfamiliar with the purposes of these schools affords no basis

to characterize them as subversive. There is no evidence whatever that any of these schools spread Japanese propaganda or in anywise endeavored to indoctrinate the pupils with noxious ideas. These schools originally were set up to teach Christianity and to Americanize children. See H. Res. 113, p. 11,772, and 28 *Cornell Law Quarterly*, pp. 448-449, and authorities there cited. They are to be commended on work well done. The average attendance of a pupil in these schools was found to be three years. The children exhibited about the same amount of interest or lack of interest in a foreign language as the average American school child. Few acquire more than a rudimentary knowledge of the Japanese language. Although a thorough knowledge of it might have occupational advantages few attain proficiency. See E. K. Strong, "*The Second Generation Japanese Problem*," pp. 6, 201. To gain an adequate reading and writing knowledge of Kanji (Chinese ideographs) used in the written language without the aid of accompanying columnar native syllabic characters requires years of study. These are barriers rendering it difficult of mastery. The little interest these children have exhibited in Japanese and their want of proficiency in it are understandable. The O.W.I. experienced considerable difficulty in finding even a few citizens and aliens qualified to act as translators of Japanese. The Army and Navy Intelligence services encountered similar difficulty and to obtain competent interpreters and translators opened up Japanese language schools at Savage, Minnesota, and Boulder, Colorado. These suspect language schools were unable to sustain the

interest of children in Japanese but did succeed in teaching Christianity and in Americanizing children. White children have been admitted freely to these schools. We are unable to discover any statements emanating from them in any manner characterizing these schools as being dangerous to our government. No reputable authority charges these schools with having been of a subversive nature. Our administration views them in a favorable light. It sponsors and fosters these schools in the W.R.A. concentration camps.

Dual citizenship.

The dual citizenship charge frequently brought against a few of these citizens too often is conceived as indicating dual allegiance. The conception is false. The United States disavows the claims of all foreign governments to the allegiance of our citizens. 18 USCA, Section 800. There is neither a legal nor a moral duty imposed upon a native-born American to divest himself of the citizenship which a foreign country may bestow upon him by virtue of its *jus sanguinis*. Why should he disavow that which he refuses to recognize? Should he spend time and money simply to notify a foreign government that he does not recognize its *jus sanguinis* and then take trouble to extricate himself from its futile claims by a complicated legal procedure? An American consul in Japan in peace time owes the American-born citizen there the full protection guaranteed by the *jus soli* of the United States under international law and this nullifies any claim Japan might assert as to jurisdic-

tion over him arising out of its *jus sanguinis*. Why should we ask these people to go to the trouble of voiding a citizenship Japan confers when they do not even accept it? Refusing to recognize it or ignoring it is in itself a repudiation. We do not ask the descendants of European aliens here to renounce citizenship arising from the *jus sanguinis* of European governments and we do not accuse them of disloyalty arising out of the fact of dual citizenship or failure to renounce it. Dual citizenship is not dual allegiance and does not create disloyalty to this nation. It is significant that Japanese descended persons have done more to shake off the dual citizenship they never solicited than have European descended citizens. Since 1924 the sole method by which an American-born Japanese can obtain rights to Japanese citizenship is by being registered within 14 days after birth with a Japanese consular official. See texts of Japanese Nationality Laws and Imperial Ordinances in Kiyo Sue Inui's "*The Unsolved Problem of the Pacific*," pp. 300-320; H.R. 2124, p. 85, note 80; 28 *Cornell Law Quarterly*, pp. 447-448. Such registration, however, could not constitute acceptance of Japanese citizenship by an infant who is not *sui juris* and is powerless to prevent the idle act. The appellant was never so registered. If we are to suspect citizens of disloyalty simply because the country of their ancestors looks upon them as entitled to the benefits of citizenship under its law we must necessarily suspect all German and Italian descended citizens of disloyalty. We must also entertain serious doubts about the loyalty of all of our citizens of foreign stock, which means of all our

citizens, for we are all descended from foreign stocks. Even the Indians must be suspected for they appear to be descendants of Mongolians. All that the silly suspicion of these people arising out of the charge of dual citizenship proves is that there is a lot of nonsense in prejudiced skulls.

The Kibei.

The General belatedly informs us of his belief that the Kibei might have been dangerous to our security. In the *Hirabayashi* case this Court speculated that this factor might have entered into his consideration concerning evacuation. The spectre was created by employing the word Kibei which has a foreign and mysterious sound to designate youths who have received a portion of their school in Japan. Was he frightened by the word? Thousands of our citizens have received a part of their education in Italy and Germany but the General didn't think of accusing them of attachment to those countries and of constituting a potential threat of danger to us. We had no word to classify them and frighten him. The F.B.I. had a complete list of the Kibei and if it suspected any of them of being hostile to us it would have arrested the suspects and examined them promptly on the question of their loyalty in the same manner as it did Japanese nationals. If the General had any cause to doubt the loyalty of any of these, he could have issued individual exclusion orders against those found to be a menace after examinations observing the elements of due process of law. The General, however, desired no such examinations. It is to be

assumed he did not because he feared their loyalty to us would be proved and his banishment program thwarted. If this was not the cause it must be concluded he was fed upon jingoist literature during his youth and had come to the belief that Oriental descended persons are all fierce, treacherous and depraved. Perhaps he read "yellow sheets" too often and too long.

If education abroad is to form the basis for a belief that it inculcates allegiance to the country where a person receives a part of his education and disloyalty to the country of which he is a citizen by birth and by choice it is evidence that all of our citizens who attended the universities of Cambridge, Oxford, Dublin, Paris, Strassbourg, Moscow, Salamanca and Brussels along with those who attended Heidelberg, Rome and Milan should be suspected, denaturalized or expatriated and finally deported. We would be rid of a large number of educated persons, an objective which might satisfy the ignorant.

CONCLUSION.

Between December 7, 1941, and the time each civilian exclusion order was issued General DeWitt had ample opportunity to arrange for the Army or civil authorities to examine into the loyalty of each person he intended to evacuate. He desired no such examinations. He would brook no opposition to his plan. He was bent upon a mass banishment and imprisonment. His then unexpressed accusation that they or some

among them might have had a predisposition to the commission of acts of espionage or sabotage and that their removal was a public security measure is spun of sheer mist. A military commander who cannot or will not endeavor to distinguish between a loyal citizen and a hostile alien lacks perception as well as judgment. It is a poor gardener who doesn't perceive the difference between a native plant and an alien weed. General DeWitt uprooted the whole garden. His neglect or refusal to make provision for their examination and the segregation of the disloyal, if any were found, within a reasonable time when the civil authorities were not only willing and competent to conduct such examinations and already had done so in the case of suspected alien enemies, was willful. He cannot now be heard to argue that his refusal to permit this was an exercise of sound discretion and mature judgment. It appears to be a constitutional infirmity of a few professional military minds to evaluate citizens as *res* and targets but seldom as humans.

It is not unlikely that General DeWitt entertained the opinion that the courts would sustain his action despite the fact that he long failed to divulge his reasons for this imprisonment program. This must have been based upon a notion that the courts in time of war conceive of themselves primarily as warriors and only secondarily as guardians of the civil liberties of citizens. Apparently he did not realize that our courts function as the sole barrier between democracy and tyranny. They constitute the bridge which links us to a republican tomorrow or to a totalitarian tomorrow.

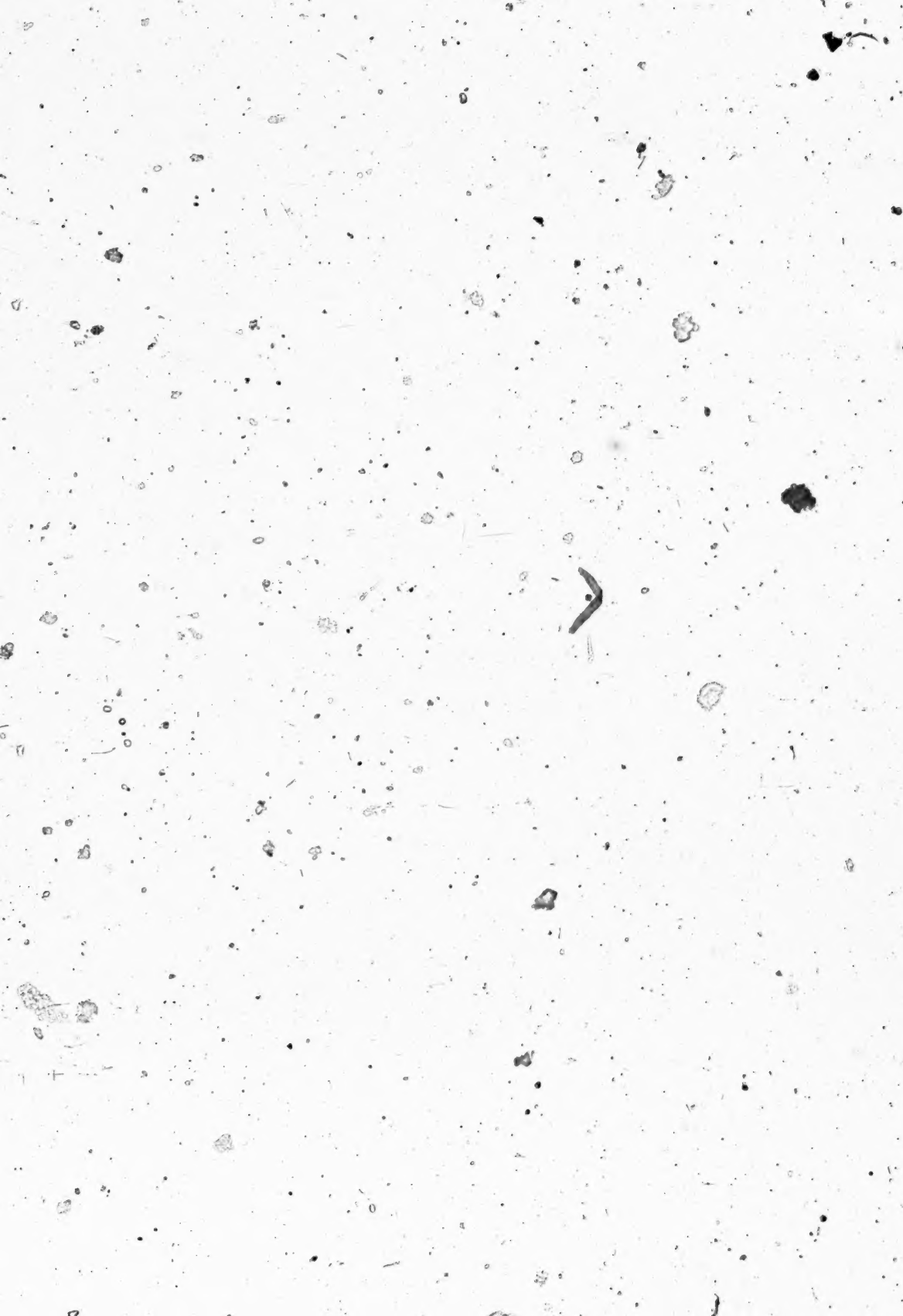
Who is this DeWitt to say who is and who is not an American and who shall and who shall not enjoy the rights of citizenship? Did he think he was a "leader" called to summon these, our people, to a Munich or Berchtesgaden? Did he think he was our chamberlin and yet forget he was the sworn servant of these citizens? While he was toying with the notion of a military dictatorship over them and trifling with its dangerous paraphernalia did he think he was acting the part of a saviour? A messianic delusion is a dangerous thing in a military mind. Napoleon had it and brought Europe to ruin. Mussolini had it and brought Italy to ruin. Hitler has it and has brought Germany to ruin.

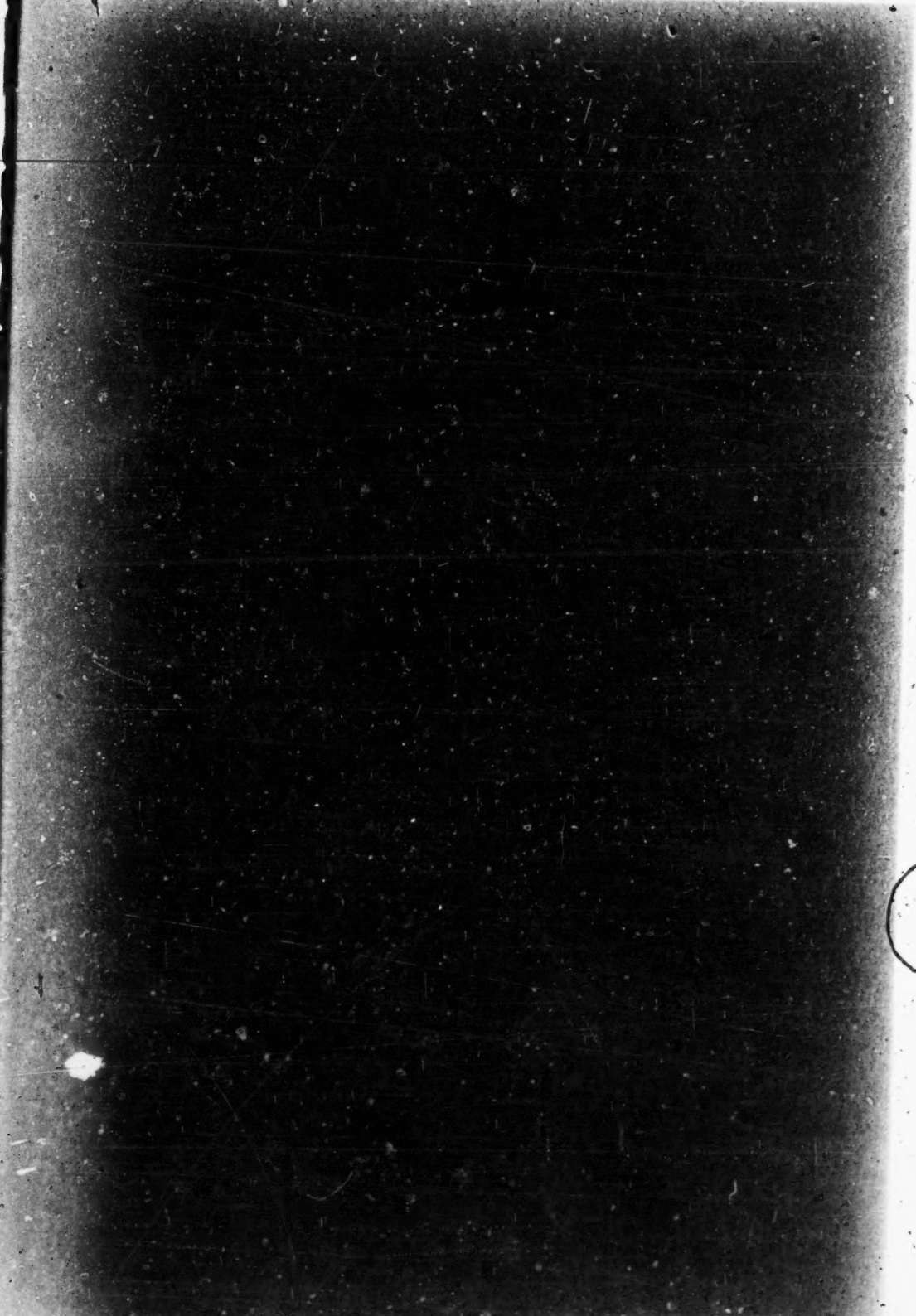
General DeWitt let Terror out to plague these citizens but closed the lid on the Pandora box and left Hope to smother. It is your duty to raise the lid and revive Hope for these, our people, who have suffered at the hands of one of our servants. Do this speedily as the law commands you. History will not forget your opinion herein.

Dated, San Francisco, California,
September 15, 1944.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Appellant.

(Appendix Follows.)





Appendix

STATUTE, EXECUTIVE ORDER AND MILITARY ORDERS, THE APPLICATION AND VALIDITY OF WHICH ARE INVOLVED.

Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, H. R. 6758, approved March 21, 1942 (see Title 18, U. S. Code, sec. 97a), the application and validity of which is involved herein, reads as follows:

> "Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Executive Order No. 9066, the construction of which is involved herein, was promulgated by the President under date of February 19, 1942. It appears in the *Federal Register* of February 25, 1942, in Vol. 7, No. 38, page 1407. It reads as follows:

> "Whereas the successful prosecution of the war requires every possible protection against espion-

age and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and

authority of the Attorney General under the said Proclamations in respect of such prohibited and restrictive areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder."

Headquarters
Western Defense Command
and Fourth Army
Presidio of San Francisco, California

May 3, 1942

CIVILIAN EXCLUSION ORDER No. 34

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P.W.T., of Saturday, May 9, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 4 described as follows:

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said Highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly and following the shoreline of San Francisco Bay to the point of beginning.

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or during the same hours on Tuesday, May 5, 1942, to the Civil Control Station located at:

920 - "C" Street,
Hayward, California.

3. Any person subject to this order who fails to comply with any of its provisions or published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P.W.T., of Saturday, May 9, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones", and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DEWITT,
Lieutenant General, U. S. Army
Commanding

C. E. Order 34

Western Defense Command and Fourth Army
Wartime Civil Control Administration
Presidio of San Francisco, California

INSTRUCTIONS
to All Persons of

JAPANESE
ANCESTRY

Living in the Following Area:

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly, and following the shoreline of San Francisco Bay to the point of beginning.

Pursuant to the provisions of Civilian Exclusion Order No. 34, this Headquarters, dated May 3, 1942, all persons of Japanese ancestry, both alien and non-alien, will be evacuated from the above area by 12 o'clock noon, P.W.T., Saturday, May 9, 1942.

No Japanese person living in the above area will be permitted to change residence after 12 o'clock noon, P.W.T., Sunday, May 3, 1942, without obtaining special permission from the representative of the Commanding General, Northern California Sector, at the Civil Control Station located at:

920 - "C" Street,
Hayward, California.

Such permits will only be granted for the purpose of unifing members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.

2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles and livestock.

3. Provide temporary residence elsewhere for all Japanese in family groups.

4. Transport persons and a limited amount of clothing and equipment to their new residence.

The following instructions must be observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each indi-

vidual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 A. M. and 5:00 P. M. on Monday, May 4, 1942, or between 8:00 A. M. and 5:00 P. M. on Tuesday, May 5, 1942.

2. Evacuees must carry with them on departure for the Assembly Center, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;

(e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group.

3. No pets of any kind will be permitted.

4. No personal items and no household goods will be shipped to the Assembly Center.

5. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household

items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

6. Each family, and individual living alone, will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or between the hours of 8:00 A. M. and 5:00 P. M., Tuesday, May 5, 1942, to receive further instructions.

J. L. DeWITT,
Lieutenant General, U. S. Army
Commanding

May 3, 1942

See Civilian Exclusion Order No. 34.

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No. 572 22

In the Supreme Court of the United States

OCTOBER TERM, 1943

FRED TOYOSABURO KOREMATSU

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 679

FRED TOYOSABURO KOREMATSU

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court below and the two concurring opinions (R. 57–96)[1] are not yet reported. There was no opinion by the trial court. The opinion of this Court that the suspended sentence was an appealable judgment is reported in 319 U. S. 432.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 2, 1943 (R. 97). The

[1] References are to pages in the typewritten transcript of record.

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petition for a writ of certiorari was filed on February 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Executive Order No. 9066 (7 F. R. 1407) and the Act of March 21, 1942 (56 Stat. 173, 18 U. S. C., Supp. II, 97a) authorized Civilian Exclusion Order No. 34 of the Commanding General, violated by the petitioner, which provided that persons of Japanese ancestry would be evacuated from a designated area and prohibited their remaining therein after May 9, 1942.

2. Whether the order was constitutional.

STATUTES, ORDERS, AND PROCLAMATIONS INVOLVED

These are printed in the Appendix, *infra*, pp. 15–32.

STATEMENT

Petitioner was convicted under the Act of March 21, 1942, *infra*, p. 17, of violating Civilian Exclusion Order No. 34, *infra*, pp. 23–25, in that he remained in the restricted area there designated after May 9, 1942, being found therein on May 30, 1942. Before stating the facts of petitioner's case, it will be helpful to describe the series of measures here involved.

Operation of the Exclusion Orders.—Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command, acting

pursuant to his authorization by the Secretary of War to take measures under Executive Order No. 9066 throughout the Western Defense Command, issued on March 2 and March 16, 1942, respectively, his Public Proclamations Nos. 1 and 2, each of which established certain military areas within that Command and provided that certain persons or classes of persons would subsequently be ordered excluded from certain of those areas (7 F. R. 2320; 7 F. R. 2405). Thereafter, in the period from March through July, 1942, General DeWitt issued a series of Orders, termed Civilian Exclusion Orders, each of which prohibited persons of Japanese ancestry, residing in a specified portion of the military areas he had previously created, from continuing to reside therein after a specified time; the Civilian Exclusion Orders in sum effected the exclusion of all persons of Japanese ancestry from the State of California and from the western sections of the States of Washington, Oregon and Arizona.[2] General DeWitt's Public Proclamation No. 4, dated March 27, 1942

[2] The Civilian Exclusion Orders, totaling 108 in number, were published at intervals in the Federal Register, beginning with Civilian Exclusion Order No. 1, dated March 24, 1942 (7 F. R. 2581), and closing with Civilian Exclusion Order No. 108, dated July 22, 1942 (7 F. R. 5916). Civilian Exclusion Orders Nos. 1 to 99 were ratified by General DeWitt's Public Proclamation No. 7, dated June 8, 1942 (7 F. R. 4498), and Orders Nos. 100 to 108 were ratified by General DeWitt's Public Proclamation No. 11, dated August 18, 1942 (7 F. R. 6703).

(7 F. R. 2601), *infra*, pp. 22–23, which recited the necessity of providing for the welfare of the affected persons and of assuring their orderly evacuation and resettlement, terminated uncontrolled migration by prohibiting the persons ordered excluded from the coastal Military Area No. 1 from departing except in accordance with subsequent orders by General DeWitt's headquarters.

Each exclusion order subsequent to Civilian Exclusion Order No. 1,[3] and including Civilian Exclusion Order No. 34 involved in this case, *infra*, pp. 23–25, provided that "persons within the bounds of an established Assembly Center pursuant to instruction from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center." Each order was accompanied by instructions stating that all the persons prohibited by the order from remaining in the area (hereinafter termed evacuees), would be furnished transportation to an Assembly Center or would be authorized to travel to it by private automobile in a supervised group; that the "Evacuees must carry with them on departure for the Assembly

[3] Civilian Exclusion Order No. 1 was issued on March 24, 1942, and provision for Assembly Centers, some of which were within Military Area No. 1, was not instituted until the use of voluntary methods of departing from the area was terminated by the issuance of Public Proclamation No. 4 on March 27, 1942.

Center" specified articles and would not be allowed to take certain other specified articles; and that the evacuees must report to a designated Civil Control Station at a specified time several days before the date for evacuation in order to receive further instructions (Appendix, *infra,* pp. 25–28). The same provision with respect to reporting to the Civil Control Station was also included in the body of each exclusion order. Each order provided that failure to comply with any of its provisions or any provision or the accompanying instructions would constitute a crime under the Act of March 21, 1942 (Appendix, *infra,* pp. 24, 17).

With a few exceptions the evacuees from Military Area No. 1 were transported on the day that their exclusions were mandatory under the respective exclusion orders, under the direction of General DeWitt's headquarters, to Assembly Centers, or to Relocation Centers established by the War Relocation Authority pursuant to Executive Order No. 9102 (7 F. R. 2165).[4] Egress from such Assembly or Relocation Centers, except

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[4] See "Instructions for Activities in Evacuation Projects," printed in House Report No. 2124, Fourth Interim Report of House of Representatives Select Committee Investigating National Defense Migration (77th Cong., 2nd Sess.), at p. 40.

Executive Order No. 9102 established the War Relocation Authority and authorized its Director to formulate and effectuate a program for the removal, relocation, maintenance and supervision of persons ordered excluded under Executive Order No. 9066.

pursuant to authority obtained from the Headquarters of General DeWitt, was prohibited by an order of General DeWitt dated May 19, 1942, (8 F. R. 982), *infra*, pp. 28–29.

Except for a few persons released on an individual basis from the Assembly Centers and a number released therefrom as part of supervised agricultural labor groups, the evacuees who had been removed to Assembly Centers were transferred from there to Relocation Centers. The prohibition in the order of May 19 with respect to leaving such Relocation Centers was incorporated by General DeWitt in his Public Proclamation No. 8, issued on June 27, 1942, *infra*, pp. 30–32, with respect to all Relocation Centers within the Western Defense Command; by letter of August 11, 1942, General DeWitt delegated authority to the War Relocation Authority to issue permits for persons to leave such centers. On August 13, 1942, Secretary of War Stimson issued Public Proclamation No. WD–1, which prohibited the egress of evacuees residing in relocation centers outside the Western Defense Command without permission from the Secretary of War or the Director of the War Relocation Authority (7 F. R. 6593). Acting pursuant to Executive Order No. 9102, the letter of authorization from General DeWitt of August 11, 1942, and Public Proclamation No. WD–1, the War Relocation Authority established a system for granting leave to persons confined in the War Relocation centers who sat-

isfy specified requirements. (See regulations of the War Relocation Authority dated September 26, 1942, 7 F. R. 7656; revised regulations dated January 1, 1944, 9 F. R. 154.)

Petitioner's Violation of the Exclusion Orders.—An information (R. 1–2) filed in the District Court for the Northern District of California on June 12, 1942, charged the petitioner, a person of Japanese ancestry, with having knowingly remained, on or about May 30, 1942, in the city of San Leandro, Alameda County, California, which was a part of Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942, and from which all such persons had been ordered excluded after May 9, 1942, by Civilian Exclusion Order No. 34 of May 3, 1942, issued by Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command, pursuant to Executive Order No. 9066 of February 19, 1942, and authority from the Secretary of War.[1]

A demurrer to the information (R. 3–18) and a supplement to the demurrer (R. 22–23) were overruled on August 31, 1942 (R. 24), and an exception taken (R. 31). On September 8, 1942, the petitioner appeared in the trial court in the custody of the military authorities, pleaded not guilty, waived trial by jury and proceeded to trial (R. 25). It was stipulated on the record

[1] The information consequently charged violation of the Act of March 21, 1942 (18 U. S. C., Supp. II, 97a), which was mentioned in the caption but not in the body of the information (R. 1).

that the petitioner is a native-born citizen of the United States, born in Oakland, Alameda County, California, on June 30, 1919, and is the son of Japanese nationals resident in California (R. 32); and that at the time of his arrest on May 30, 1942, the petitioner was in the City of San Leandro, Alameda County, California, within the area from which he, as a person of Japanese ancestry, had been ordered excluded by General DeWitt's Public Proclamation No. 1 and Civilian Exclusion Order No. 34 (R. 32).

A Special Agent of the Federal Bureau of Investigation testified that he interviewed the petitioner on May 31, 1942, and obtained a written statement (U. S. Ex. No. 1, R. 33–35) which was received in evidence and states that the petitioner had lived all his life with his folks until four weeks before they had to evacuate; that he left home at that time telling them that he was going to Nevada but instead stayed in Oakland to earn enough money to take his girl, of Italian nationality, with him to the Midde West (R. 34); that between the time he left home and the date of evacuation he lived for two weeks in San Francisco during an operation on his face for the purpose of changing his appearance so that he would not be subjected to ostracism when he went East; that after the other Japanese were evacuated he lived in Oakland and worked in Berkeley and after the date of evacuation used the name of Clyde Sarah where he roomed and where he worked; registered for a new social security card under that name, and

changed his draft registration card (U. S. Ex. No. 3 in evidence, R. 37–38) with ink remover to "Clyde Sarah" (R. 34–35). The Special Agent testified that he interviewed the petitioner on June 1, 1942 and obtained a second written statement (U. S. Ex. No. 2, R. 35–36) which was received in evidence and states that he had been living and working in Alameda County since the date of evacuation and seeing his girl once or twice a week in the evening, and that on May 30, 1942, the day on which he was arrested, he was with his girl and told her that he had quit his job and was going to give himself up (R. 36). The Special Agent further testified that the petitioner told him that he had adopted the name Clyde Sarah to disguise his identity as a Japanese American born citizen; that he wanted to remain in Alameda County, Oakland, and San Leandro because of friendly relationships with people there and that he consid red himself an American and did not want to be evacuated (R. 36–37). The Government rested its case and the petitioner's motion for dismissal of the information and judgment of acquittal was denied (R. 38).

The petitioner testified on his own behalf that he was single, that he had resided with his parents since his birth in Oakland nd that he had three brothers each born in Oakla d; that he had never departed from the continenta limits of the United States; that he was graduated from Stoners Grammar School and the Castlemont High School in Oakland; that he had attended Los Angeles

Junior College in Los Angeles for three months in 1938 where he studied chemistry and worked after school hours to earn his way through college and was compelled to abandon his studies because of his inability to earn sufficient funds to support himself (R. 39). He returned to work in Oakland in the nursery of his father who is now at the Tanforan Assembly Center and a man has taken over his nursery (R. 39). Because of physical defects he was rejected for military service under the Selective Service and Training Act of 1940 and studied welding and obtained employment as a welder for two and a half months before the war. He has been a registered voter in Alameda County since attaining the age of twenty-one years. (R. 39.) He testified that he has never renounced his American citizenship; that he registered for the draft, and is ready, willing and able to bear arms for this country and is willing to enlist and to render any service that he may be called upon in our war against the Axis nations including the Empire of Japan (R. 40). He testified that he did not owe allegiance to any country other than the United States and had no dual allegiance of citizenship and that his birth has not, either with his consent or knowledge, been registered with any consul of the Empire of Japan; that he has never attended and never cared to attend any Japanese school, and is not familiar with the Japanese language as a native and speaks "Japanese in broken English" (R. 40). He cannot read the Japanese language either in manuscript or newspaper form. He un-

derstands a little Japanese when it is spoken, and, as his mother does not understand his broken speech, his elder brother interprets his English into Japanese for her. He testified that he was never charged with any felony or misdemeanor and has never renounced his citizenship. (R. 40.)

On cross-examination the petitioner stated that he was not a member of the Japanese Association, and did not know whether his birth had ever been registered thru the Japanese Association but did not think it had. He did not think that his brothers were registered with the Japanese Association. He testified that his brothers and he naturally belong to this country and did not know any other country; that he was willing to enlist but he had stomach ulcers and the doctors told him he was not fit for service. On being rejected in the draft he spent $150 out of his own pocket to study welding and went to work in the shipyards as a welder. He changed his name to conceal his identity as a person of Japanese ancestry and had an operation to change his facial appearance for the same purpose, but he did not think that this made any change in his appearance, for when he went to the Tanforan Assembly Center everyone knew him and his folks did not know the difference. (R. 40–41.)

The petitioner's motion in arrest of judgment was denied and the court sentenced him to a period of probation for five years (R. 42), on September 8, 1942, the judgment was entered (R. 25–26). On appeal to the circuit court of appeals,

that court certified the question whether the judgment was an appealable one. After this Court's decision (319 U. S. 432) in the affirmative, the circuit court of appeals sitting *en banc* unanimously affirmed the conviction, two judges delivering concurring opinions.

DISCUSSION

We agree with the court below that the question in the present case of the power to exclude all persons of Japanese ancestry from the military areas is ruled by the decision of this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, holding the military curfew order valid. The facts judicially noticed in that case, bearing upon the validity of the classification of persons of Japanese ancestry and the relationship between the measures taken to the prevention of espionage and sabotage, are equally relevant in the present case. The time and purpose of the curfew order and of the exclusion order here involved are closely similar. Legislative and executive authority for the exclusion order would seem to be even plainer than such authority for the curfew order, since the Act of March 21, 1942, *infra*, p. 17, and the prior Executive Order No. 9066, *infra*, pp. 15–17, relate in terms to prohibitions against remaining in designated military areas, and Congress was well informed, at the time of passing the act in question, of the projected evacuation of persons of Japanese ancestry. See the Government's brief in the *Hirabayashi* case, No. 870, 1942 Term, pp. 38–41.

It is believed that questions relating to subsequent detention are not properly in issue in the present case. The conviction here was for remaining within the designated area after the final date fixed for evacuation. It is true that the evacuation required close control over the movement of the persons affected. But petitioner was not detained in an assembly center for any period, and he objected generally to exclusion (R. 36–37) without addressing his objection particularly to the restraint involved in connection therewith.[6] In refusing to present himself and in remaining in the area the petitioner was not entitled to assume that the character or duration of subsequent control would be unreasonable or would afford ground for legitimate complaint. Particularly is this true since the writ of habeas corpus remained available as a means of testing the legality of any subsequent detention, and of doing so on a record which would present a real and not an assumed state of facts. Whether petitioner would have found it necessary or desirable to apply for release in this manner is itself a matter of conjecture.[7]

[6] Some evacuees were released from assembly centers; the majority were transferred to relocation centers operated by War Relocation Authority. The transfer was completed by November 1942. First Quarterly Report of W. R. A. (March 18 to June 30, 1942), pp. 17–18; Second Quarterly Report of W. R. A. (July 1 to Sept. 30, 1942), pp. 2–3, 11–14; and Quarterly Report of W. R. A. (October 1 to December 31, 1942), pp. 1–3; Senate Document No. 96, 78th Cong., 1st Sess., pp. 7–8, Segregation of Loyal and Disloyal Japanese in Relocation Centers.

[7] The validity of detention in a war relocation center is in issue in *Endo* v. *Eisenhower*, pending on appeal in the Circuit

While the exclusion order here involved results in substantially greater impairment of liberties than did the curfew order and while this Court in the *Hirabayashi* case reserved the question herein raised, we believe that the decision below is correct under the principles of the *Hirabayashi* case.* If the Court should regard the *Hirabayashi* decision as not dispositive of the present case, or should, contrary to our position, deem the validity of the detention of other persons of Japanese ancestry in war relocation centers to be properly in issue here, the case would present Federal questions of importance and the Government would recognize the propriety of further review.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
EDWARD J. ENNIS,
Director, Alien Enemy Control.

MARCH 1944.

Court of Appeals for the Ninth Circuit, the district court having refused to grant a discharge on a writ of habeas corpus. In the light of this proceeding it is difficult to understand the suggestion in the brief of *amicus curiæ* in this Court to the effect that the order here in question is an attempt "to circumvent the prohibition against the suspension of habeas corpus" (Brief, p. 6). The statement in the concurring opinion of Judge Stephens (R. 99, n. 3a) that no one confined in a war relocation center has prosecuted a petition for a writ of habeas corpus to decision must be read to take account of the pendency of the *Endo* case.

The present case is the only criminal proceeding now pending involving violation of a general exclusion order.

APPENDIX

EXECUTIVE ORDER NO. 9066, DATED FEBRUARY 19, 1942, 7 F. R. 1407

AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS

WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby

authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore

granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

Act of March 21, 1942, c. 191, 56 Stat. 173, 18 U. S. C., Supp. II, 97a).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

PUBLIC PROCLAMATION No. 1, 7 F. R. 2320

WAR DEPARTMENT

(Public Proclamation No. 1)

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California.

MILITARY AREAS NOS. 1 AND 2 DESIGNATED AND ESTABLISHED

MARCH 2, 1942.

To: The people within the States of Arizona, California, Oregon, and Washington, and the Public Generally.

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded,

and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations;

Now therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2.

2. Military Areas Nos. 1 and 2, as particularly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A–1, lying wholly within Military Area No. 1; Zones A–2 to A–99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and Zone B, comprising all that part of Military Area No. 1 not included within Zones A–1 to A–99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A–2 to A–99, inclusive, as are within Military Area No. 2.

Certain persons or classes of persons who are by subsequent proclamation excluded from the zones last above mentioned may be permitted, under certain regulations and restrictions to be hereafter prescribed, to enter upon or remain within Zone B.

The designation of Military Area No. 2 as such does not contemplate any prohibition or regulation or restriction except with respect to the zones established therein.

5. Any Japanese, German or Italian alien, or any person of Japanese Ancestry now resident in Military Area No. 1 who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within the States of Washington, Oregon, California and Arizona. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The designation of prohibited and restricted areas within the Western Defense Command by the Attorney General of the United States under the Proclamations of December 7 and 8, 1941, and the instructions, rules and regulations prescribed by him with respect to such prohibited and restricted areas, are hereby adopted and continued in full force and effect.

The duty and responsibility of the Federal Bureau of Investigation with respect to the investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

Confirmed:
J. A. ULIO,
Major General,
The Adjutant General.

PUBLIC PROCLAMATION No. 4, 7 F. R. 2601

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California.

Public Proclamation No. 4.

MARCH 27, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

Whereas, by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there was designated and established Military Area No. 1, and

Whereas, it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare that the present situation requires as a matter of military necessity that, commencing at 12:00 midnight, P. W. T., March 29, 1942, all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct.

Any person violating this proclamation will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zones." In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

CIVILIAN EXCLUSION ORDER NO. 34, 7 F. R. 3967

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California.

(Civilian Exclusion Order No. 34)

Persons of Japanese Ancestry Excluded from Restricted Area—Alameda County, California

MAY 3, 1942.

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P. W. T., of Saturday, May 9, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows:

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of

the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said Highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly, and following the shoreline of San Francisco Bay to the point of beginning.

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or during the same hours on Tuesday, May 5, 1942, to the Civil Control Station located at: 920 "C" Street, Hayward, California.

3. Any person subject to this order who fails to comply with any of its provisions or published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P. W. T., of Saturday, May 9, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions

from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DEWITT,
Lieutenant General, U. S. Army,
Commanding.

(Instructions Accompanying Civilian Exclusion Order No. 34)

Western Defense Command and Fourth Army Wartime Civil Control Administration, Presidio of San Francisco, California.

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY LIVING IN THE FOLLOWING AREA

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said Highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly, and following the shoreline of San Francisco Bay to the point of beginning.

Pursuant to the provisions of Civilian Exclusion Order No. 34, this Headquarters, dated May 3, 1942, all persons of Japanese ancestry, both alien and non-alien will be evacuated from the

above area by 12 o'clock noon, P. W. T., Saturday, May 9, 1942.

No Japanese person living in the above area will be permitted to change residence after 12 o'clock noon, P. W. T., Sunday, May 3, 1942, without obtaining special permission from the representative of the Commanding General, Northern California Sector, at the Civil Control Station located at:

920 "C" Street.
Hayward, California.

Such permits will only be granted for the purpose of uniting members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.

2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles, and livestock.

3. Provide temporary residence elsewhere for all Japanese in family groups.

4. Transport persons and a limited amount of clothing and equipment to their new residence.

THE FOLLOWING INSTRUCTIONS MUST BE OBSERVED:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the

Civil Control Station to receive further instructions. This must be done between 8:00 A. M. and 5:00 P. M. on Monday, May 4, 1942, or between 8:00 A. M. and 5:00 P. M. on Tuesday, May 5, 1942.

2. Evacuees must carry with them on departure for the Assembly Center, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;

(e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group.

3. No pets of any kind will be permitted.

4. No personal items and no household goods will be shipped to the Assembly Center.

5. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only

one name and address will be used by a given family.

6. Each family, and individual living alone, will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or between the hours of 8:00 A. M. and 5:00 P. M., Tuesday, May 5, 1942, to receive further instructions.

J. L. DEWITT,
Lieutenant General, U. S. Army,
Commanding.

MAY 3, 1942.

See Civilian Exclusion Order No. 34.

CIVILIAN RESTRICTIVE ORDER NO. 1, DATED MAY 19, 1942, 8 F. R. 982

WAR DEPARTMENT.

(Civilian Restrictive Order 1)

Persons of Japanese Ancestry—Procedure for Departure From Assembly Centers, Etc.

MAY 19, 1942.

Headquarters Western Defense Command and Fourth Army, Office of the Commanding General, Presidio of San Francisco, California.

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this headquarters, dated March 2, 1942, and March 16, 1942, respectively: *It is hereby ordered,* That all persons of Japanese ancestry, both alien and non-alien who now, or shall hereafter reside, pursuant to exclusion orders and instructions from this headquarters, within the bounds of established assembly centers, reception centers or relocation centers, as such bounds are designated on the ground by boundary signs in each case, shall during the period of such residence be subject to the following regulations:

(a) All such persons are required to remain within the bounds of assembly centers, reception centers or relocation centers at all times unless specifically authorized to leave as set forth in paragraph (b) hereof.

(b) Any such person, before leaving any of these centers, must first obtain a written authorization executed by or pursuant to the express authority of this headquarters setting forth the hour of departure and the hour of return and the terms and conditions upon which said authorization has been granted.

2. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto will be liable to the penalties and liabilities provided by law.

J. L. DEWITT,
Lieutenant General, U. S. Army,
Commanding.

PUBLIC PROCLAMATION No. 8, 7 F. R. 8346

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California

PUBLIC PROCLAMATION NO. 8

JUNE 27, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally.

Whereas by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2, and by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6, and

Whereas the present situation within these military areas requires as a matter of military necessity that persons of Japanese ancestry who have been evacuated from certain regions within Military Areas Nos. 1 and 2 shall be removed to Relocation Centers for their relocation, maintenance and supervision and that such Relocation Centers be designated as War Relocation Project Areas and that appropriate restrictions with respect to the rights of all such persons of Japanese ancestry, both alien and non-alien, so evacuated to such Relocation Centers and of all other persons to enter, remain in, or leave such areas be promulgated;

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

a. Pursuant to the determination of military necessity hereinbefore set out, all the territory included within the exterior boundaries of each Relocation Center now or hereafter established within the Western Defense Command, as such boundaries are designated and defined by orders subsequently issued by this headquarters, are hereby designated and established as War Relocation Project Areas.

b. All persons of Japanese ancestry, both alien and nonalien, who now or shall hereafter be or reside, pursuant to exclusion orders and instructions from this headquarters, or otherwise, within the bounds of any established War Relocation Project Area are required to remain within the bounds of such War Relocation Project Area at all times unless specifically authorized to leave as set forth in Paragraph c hereof.

c. Any person of Japanese ancestry, both alien and nonalien, who shall now or hereafter so be or reside within any such War Relocation Project Area, shall, before leaving said Area, obtain a written authorization executed by or pursuant to the express authority of this headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted.

d. No persons other than the persons of Japanese ancestry described in Paragraph b hereof, and other than persons employed by the War Relocation Authority established by Executive Order No. 9102, dated March 18, 1942, shall enter any such War Relocation Project Area except upon written authorization executed by or pursuant to the express authority of this headquarters first obtained, which said authorization shall set forth the effective period thereof and the terms and conditions upon and purposes for which it has been granted.

e. Failure of persons subject to the provisions of this Public Proclamation No. 8 to conform to the terms and provisions thereof shall subject such persons to the penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing any Act in Military Areas or Zones."

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

No. 22

In the Supreme Court of the United States

OCTOBER TERM, 1944

FRED TOYOSABURO KOREMATSU, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court below and the two concurring opinions (R. 33–54) are reported at 140 F. (2d) 289. There was no opinion by the trial court. The opinion of this Court that petitioner's suspended sentence was an appealable judgment is reported at 319 U. S. 432.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 2, 1943 (R. 33). The petition for a writ of certiorari was filed on Feb-

ruary 8, 1944 (R. 66) and was granted March 27, 1944 (R. 65). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Executive Order No. 9066 (7 F. R. 1407) and the Act of March 21, 1942, 56 Stat. 173 (18 U. S. C., Supp. III, Sec. 97a) authorized the provision of Civilian Exclusion Order No. 34 (7 F. R. 3967), which prohibited the presence of persons of Japanese ancestry in a designated area after a specified date.

2. Whether the provision of Civilian Exclusion Order No. 34, which prohibited the presence of persons of Japanese ancestry in a designated area after a specified date, was constitutional.

3. Whether petitioner has standing to raise any question as to the detention to which he would have been subjected if he had reported for evacuation in accordance with the terms of Civilian Exclusion Order No. 34.

4. If petitioner does have standing to raise an issue with regard to such detention, whether the detention would have been lawful.

STATUTES, ORDERS, AND PROCLAMATIONS INVOLVED

Civilian Exclusion Order No. 34, issued by Lieutenant General John L. DeWitt on May 3, 1942, was promulgated in accordance with his Public Proclamation No. 1, issued on March 2,

1942 (7 F. R. 2320); and both the Order and the Proclamation were promulgated under the authority granted by Executive Order No. 9066 and the Act of March 21, 1942. A summary of the content of these documents follows at pp. 6–9; a more detailed statement is given in Appendix I, *infra*, at pp. 60–75, and the documents themselves are set forth in Appendix II at pp. 76–78, 79–97.

STATEMENT

1. PETITIONER'S VIOLATION OF THE EXCLUSION ORDER

An information (R. 1), filed in the District Court for the Northern District of California on June 12, 1942, charged the petitioner, a person of Japanese ancestry, with having knowingly remained, on or about May 30, 1942, in that portion of Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942, including the City of San Leandro, Alameda County, California, from which all such persons had been ordered excluded after May 9, 1942, by Civilian Exclusion Order No. 34 of May 3, 1942, issued by Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command, pursuant to Executive Order No. 9066 of February 19, 1942, and authority from the Secretary of War.[1]

[1] The information consequently charged violation of the Act of March 21, 1942 (18 U. S. C., Supp. III, Sec. 97a), which was mentioned in the caption but not in the body of the information (R. 1).

A demurrer to the information (R. 2–13) and a supplement to the demurrer (R. 13–14) were overruled on August 31, 1942 (R. 14–16), and an exception was taken. On September 8, 1942, the petitioner appeared in the trial court in the custody of the military authorities and with his attorneys, pleaded not guilty, waived trial by jury, and proceeded to trial (R. 15). It was stipulated on the record that the petitioner is a native-born citizen of the United States, born in Oakland, Alameda County, California, on June 30, 1919, to Japanese nationals resident there (R. 19); and that at the time of his arrest on May 30, 1942, the petitioner was in the City of San Leandro, Alameda County, California, within the area from which he knew that he, as a person of Japanese ancestry, had been ordered excluded by General DeWitt's Public Proclamation No. 1 and Civilian Exclusion Order No. 34 (R. 19).

Petitioner's testimony, which was not controverted, showed that he has never renounced his American citizenship; that he has never departed from the continental limits of the United States; that his birth has not, with either his consent or knowledge, been registered with any consul of the Empire of Japan; and that he does not possess any form of dual allegiance and does not owe allegiance to any country other than the United States (R. 24). He registered for the draft and testified that he is willing to bear arms for this country and to render any service requested of him

in the war against Japan (R. 24). He has been a registered voter in Alameda County since attaining the age of 21 years (R. 24). The remainder of his testimony also tended to show his lack of sympathy with Japan and his assimilation in the American community (R. 24–25). The evidence introduced by the United States showed that the petitioner had continued to work and live in Alameda County after May 9 because of friendly relations with its residents, and particularly with a girl who was not of Japanese ancestry, and because he considered himself an American and did not want to be evacuated (R. 20–22).

The petitioner was convicted (R. 25) and thereafter his motion in arrest of judgment was denied and the court sentenced him to a five-year period of probation (R. 26); the judgment was entered September 8, 1942, the day of the trial (R. 26). On appeal to the Circuit Court of Appeals, that court certified the question whether the judgment was an appealable one. After this Court's decision (319 U. S. 432) in the affirmative, the Circuit Court of Appeals, sitting *en banc*, unanimously affirmed the conviction, two judges delivering concurring opinions (R. 33–64).

2. THE EXCLUSION PROGRAM

The issues raised by petitioner extend to various aspects of the exclusion program of which Civilian Exclusion Order No. 34 (*infra*, pp. 88–89), which petitioner violated, was a part. The details of

that program are set forth in Appendix I, *infra*. They will be summarized here and this summary will be followed by a brief statement with regard to the reasons for the program.

A. CIVILIAN EXCLUSION ORDERS

Civilian Exclusion Order No. 34 of May 3, 1942, was one of a series of 108 such orders issued by Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command, to accomplish the removal of all persons of Japanese ancestry from Military Area No. 1 and a portion of Military Area No. 2, embracing the West Coast area composed of the State of California, the western portions of Oregon and Washington, and the southern portion of Arizona (*infra*, p. 60). These orders, each of which applied to a defined locality or territory of limited size, were issued during a period commencing March 24, 1942 and extending to July 22, 1942 (*infra*, p. 64). They were authorized under a delegation of power to General DeWitt from the Secretary of War (*infra*, p. 60) pursuant to Executive Order No. 9066 of February 19, 1942, which authorized the establishment of military areas from which "any or all persons may be excluded" and with respect to which the right to enter, remain, or leave might be subjected to restrictions. The Executive Order was ratified and violation of the regulations issued pursuant to it was made a misdemeanor by the Act of March 21, 1942 (*infra*, pp. 60–61).

The Exclusion Orders were foreshadowed by General DeWitt's Public Proclamation No. 1, issued on March 2, 1942 (*infra*, pp. 79–82), which stated that "such persons or classes of persons as the situation may require" would by subsequent orders "be excluded" from the coastal area. During the interval between this Proclamation and Public Proclamation No. 4 of March 27, 1942 (*infra*, pp. 86–87) which forbade persons of Japanese ancestry to leave Military Area No. 1, the self-arranged migration of such persons from the area was encouraged and assisted by a Wartime Civil Control Administration established by General DeWitt (*infra*, pp. 62–63).

Civilian Exclusion Order No. 1 of March 24, 1942, applicable to a small territory in the State of Washington, permitted self-arranged migration during the five days following its issuance (*infra*, p. 65), before its provision for the group evacuation from the territory of persons of Japanese ancestry and their exclusion thereafter from the territory became effective; but all of the subsequent Orders, including Order No. 34, and the accompanying Instructions, imposed the requirement that all such persons retain their previous residences, unless individually permitted to change, until the dates which were prescribed for their removal. After these dates it became an offense for any such person to remain or be found within the designated territory (*infra*, p. 65).

To accomplish the evacuation of persons of Japanese ancestry from each of the defined territories, the applicable Civilian Exclusion Order and Instructions required a member of each family and each individual living alone in the territory to report to a previously established Civil Control Office or Station and provided that all persons of Japanese ancestry would be "evacuated" upon a specified exclusion date six days after the date of the Order (infra, p. 65). It was stated that the Civil Control Office or Station would assist the persons affected. In fact, assistance was given with respect to the disposition of the property and affairs of these persons (*infra*, p. 63).

The evacuees were transported under military control and with regard to their welfare, on the dates their exclusion became mandatory, to previously prepared Assembly Centers not far removed, located within Military Area No. 1, where they were temporarily detained pending their transfer to Relocation Centers (*infra*, p. 66). The detention of the evacuees in these Centers was required by the provisions of the Exclusion Orders which forbade them to remain within the specified territories following the prescribed removal dates, except in Assembly Centers, and by General DeWitt's Civilian Restrictive Order No. 1 (*infra*, pp. 93–94), issued on May 19, 1942, which required the persons confined in Assembly Centers to stay there unless individually permitted to leave (*infra*,

p. 68). The evacuees under Civilian Exclusion Order No. 34 were taken to the Tanforan Assembly Center in San Mateo County, California. Civilian Exclusion Order No. 35 of May 3, 1942, applied to that county.

REMOVAL FROM ASSEMBLY CENTERS

Beginning in May, 1942, provision was made for the temporary release of a limited number of evacuees from Assembly Centers to engage in supervised agricultural work outside the evacuated areas. A few evacuees were released in other ways. (*Infra*, p. 74.) The great bulk of the evacuees in Assembly Centers were, however, removed during the period between May and November, 1942, to Relocation Centers maintained by the War Relocation Authority established by Executive Order No. 9102 of March 18, 1942 (*infra*, p. 74). All together, 108,503 of the 110,219 evacuees originally transported to the Assembly Centers were so removed. All but a few of the evacuees at the Tanforan Assembly Center were removed to the Central Utah Relocation Project in September and October, 1942 (*infra*, p. 74).

Although relocation of the evacuees, which followed petitioner's arrest in point of time and was begun after his initial violation, is, we believe, not in issue in this case, a few facts with regard to it will serve to place the Assembly Center phase of the exclusion program in its relation to subsequent developments.

The Relocation Centers provided more adequate facilities and permitted greater provision for normal modes of living by evacuees than did the temporary Assembly Centers. They were intended to serve as places of residence pending more permanent relocation in communities. Persons removed to the Relocation Centers were required to remain there by Civilian Restrictive Order No. 1 (*supra*, p. 8), except as the War Relocation Authority might issue permits for them to leave (*infra*, p. 94). That Authority has made provision for such permits to issue and has assisted many evacuees to move to communities throughout the country east of the forbidden West Coast area. The development and results of the Authority's leave program and procedures are fully set forth in the Government's brief in *Ex parte Endo*, No. 70 at the present Term of Court, and will not be detailed in the present brief. Reference is made (*infra*, pp. 72–73), however, to the principal regulations under which leave from the Relocation Centers has been granted. The leave procedures were inaugurated July 20, 1942, and had resulted by July 29, 1944, in the relocation in outside communities of 28,911 evacuees, leaving 79,686 still resident in the Centers. Formal authority to issue leave permits was conferred upon the War Relocation Authority by the Military Commander on August 11, 1942 (*infra*, p. 72).

3. REASONS FOR THE EXCLUSION PROGRAM

The situation leading to the determination to exclude all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2 was stated in detail in the Government's brief in this Court in *Hirabayashi* v. *United States*, No. 870, October Term, 1942, and was reviewed in the opinion in that case, 320 U. S. 81. That statement need not be repeated here.[2] In brief, facts which were generally known in the early months of 1942 or have since been disclosed indicate that there was ample ground to believe that imminent danger then existed of an attack by Japan upon the West Coast. This area contained a large concentration of war production and war facilities. Of the 126,947 persons of Japanese descent in the United States, 111,938 lived in Military Areas No. 1 and No. 2, of whom approximately two-thirds were United States citizens. Social, economic, and political conditions prevail-

[2] The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944), hereinafter cited as *Final Report*, is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.

ing since the immigration of the Japanese to the United States were such that the assimilation of many of them by the white community had been prevented. There was evidence indicating the existence of media through which Japan could have attempted, and had attempted, to secure the attachment of many of these persons to the Japanese Government and to arouse their sympathy and enthusiasm for its war aims. There was a basis for concluding that some persons of Japanese ancestry, although American citizens, had formed an attachment to, and sympathy and enthusiasm for, Japan. It was also evident that it would be impossible quickly and accurately to distinguish these persons from other citizens of Japanese ancestry. The presence in Military Areas Nos. 1 and 2 of persons who might aid Japan was peculiarly and particularly dangerous.

Under these circumstances the determination was made to exclude all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2. The persons affected were at first encouraged and assisted to migrate under their own arrangements, but this

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In addition to the authorities cited in the *Hirabayashi* brief, see Anonymous (An Intelligence Officer), *The Japanese in America, The Problem and the Solution*, Harper's Magazine for October 1942, p. 489; the article is stated at p. 564 to have been condensed from a series of reports by an Intelligence Officer, stationed for many years on the West Coast, whose primary duty was the study of the West Coast residents of Japanese ancestry. See also *Issei, Nisei, Kibei*, Fortune Magazine for April, 1944 (Vol. XXIX, No. 4), p. 8.

method of securing their removal from Military Area No. 1 was terminated by Public Proclamation No. 4 (*infra*, pp. 86–87). The Proclamation recited that it was necessary to restrict and regulate the migration from that Area in order to insure the orderly evacuation and resettlement of the persons affected. Elsewhere the voluntary program was stated to have broken down; and it was brought out that greater control was necessary "to insure an orderly evacuation and protect the Japanese".[4]

The rate of self-arranged migration was inadequate, partly because of growing indications that persons of Japanese ancestry proceeding to new communities were likely to meet with hostility and even violence (*infra*, pp. 41–43). The spokesmen for one organization of persons of Japanese ancestry testified before the House of Representatives Committee Investigating National Defense Migration in February 1942, while the evacuation was under discussion, that even at that time the members of the organization feared to migrate.[5] The Committee during the same month requested the opinions of the Governors of the Rocky Mountain States with regard to the possibility of resettling Japanese evacuees from the West Coast area in those States.

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[4] *Fourth Interim Report of the Select Committee Investigating Defense Migration of the House of Representatives*, H. Rep. No. 2124, 77th Cong., 2d sess. (hereinafter cited as *Fourth Interim Report*), pp. 6, 8.

[5] *Hearings before the House Committee Investigating National Defense Migration*, 77th Cong., 2d sess., Part 29, pp. 11137, 11156.

Twelve governors replied that local sentiment was opposed to any such resettlement except perhaps upon condition that the evacuees be isolated in camps maintained by the Government.[7] After compulsory evacuation had begun, the Governor and Attorney General of New Mexico opposed any colonization in that State;[8] the Governor of Idaho advocated the return of all persons of Japanese ancestry to Japan and opposed their relocation in that State;[9] and the Governor of Montana urged that no land be sold or leased to the Japanese.[10]

The need of greater expedition and of effective means of providing for the maintenance and welfare of the evacuees, together with a policy of keeping local groups together so far as possible, led to the inauguration by Public Proclamation No. 4 of the method of controlled evacuation by communities, followed by relocation, which involved the detention of the evacuees during its effectuation."

The purpose and execution of the relocation phase of the exclusion program are fully set forth in the Government's brief in *Ex parte Endo*, No. 70, this Term. The objectives are to safeguard

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[6] *Preliminary Report of the Select Committee Investigating National Defense Migration of the House of Representatives*, H. Rep. No. 1911, 77th Cong., 2d sess., hereinafter cited as *Preliminary Report*, pp. 27–30. See also *Fourth Interim Report*, p. 17.

[7] *Albuquerque Journal*, May 29, 1942, p. 1.

[8] *Spokane Spokesman Review*, May 24, 1942, p. 7.

[9] *Billings Gazette*, April 30, 1942, p. 14.

[10] See *Final Report*, p. 43.

the war effort and provide for the welfare of the evacuees. To this end, the release of each individual for resettlement is conditioned upon a determination (1) that his release will not be prejudicial to the country's security and (2) that he will have means of support and is likely to be accepted by the particular community to which he proposes to go. The first determination obviously requires time; but its accomplishment in individual cases has far outrun the reabsorption of the evacuees. In relation to the second determination, expressions of hostility towards the evacuees have continued. In the 1943 sessions of the state legislatures, bills directed against persons of Japanese ancestry were introduced in at least 11 States in addition to the three West Coast States. The bills sought to prohibit land ownership by persons of Japanese ancestry;[11] to restrict business transactions with evacuees;[12] to restrict their voting privileges;[13] to revoke the citizenship of dual citizens;[14] to establish segregation in the schools;[15] and to bar student evacuees.[16]

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[11] Sen. Bill 251, Alabama; Sen. Bill 250, House Bill 531, Colorado; Sen. Bill 351, Florida; Ark. Sess. L. (1943) Act 47. Land ownership by Japanese aliens was restricted by Utah Sess. L. (1943), c. 85; Wyo. Sess. L. (1943), c. 35.

[12] Ariz. Sess. L. (1943), c. 89.

Wyo. Sess. L. (1943), c. 27.

[14] Mont. Sess. L. (1943), p. 595.

[15] Sen. Bill 103, Arkansas.

[16] Memorial of Arizona legislature; memorial of Idaho legislature; memorial of Iowa legislature. *Cf.* House Bill 1015, Pennsylvania, to terminate appropriations to any State institution participating in the relocation program.

SUMMARY OF ARGUMENT

The primary question presented is whether the provision of Civilian Exclusion Order No. 34 making it an offense for persons of Japanese ancentry to be found in the defined area after the effective date of the order is valid. The determination of this question involves consideration of three subsidiary questions: (1) whether the order was within Executive Order No. 9066 and the Act of March 21, 1942, upon which it rested; (2) whether the evacuation from the local region of persons of Japanese ancestry, including American citizens, and their exclusion from the West Coast (Military Area No. 1), which the several proclamations and orders were primarily designed to accomplish, was a valid exercise of the war power under the circumstances; and (3) if, contrary to the Government's contention, the question is here in issue, whether the detention of petitioner in connection with the method adopted to accomplish evacuation, to which he would have been subjected if he had obeyed Civilian Exclusion Order No. 34, would have been valid.

The authority for the removal of persons of Japanese ancestry from the West Coast in Executive Order No. 9066 and the Act of March 21, 1942, has been determined by this Court in *Hirabayashi v. United States*, 320 U. S. 81. The exclusion comes within the specific language of both the Order and the Act and was within the announced

objectives of both at the time the Act was under consideration. The Act unquestionably ratified the Executive Order.

The removal was a valid exercise of the war power because the military situation which this Court noticed in the *Hirabayashi* case, coupled with the danger from a disloyal minority and the difficulty of segregating these from other persons of Japanese ancestry, constituted a substantial basis for the military decision that the exclusion was a necessary protective measure (320 U. S. at p. 95).

Petitioner's conviction of remaining in the forbidden zone raises no further issue. None other was effectively raised in the District Court or decided by the Circuit Court of Appeals. Petitioner was convicted solely of remaining where he had no right to be. If this central feature of the exclusion program was valid, he cannot contend that the whole program should fail because some other part of it was invalid. He might have challenged the detention in an Assembly Center had he submitted to it. But, if he may so challenge it in this case, we submit that the method of group evacuation and the detention which was a concomitant of this method, like the exclusion itself, were reasonable and appropriate means of carrying forward a valid program. They constituted an orderly method of effecting the exclusion, having regard for both the purpose of the program and the

wellbeing of the evacuees. In any event, the detention of the evacuees as a group in Relocation Centers is not involved in this case.

ARGUMENT

I

THE PROVISION OF CIVILIAN EXCLUSION ORDER NO. 34 WHICH PROHIBITED PETITIONER'S PRESENCE IN A DESIGNATED AREA AFTER A SPECIFIED DATE WAS AUTHORIZED BY EXECUTIVE ORDER NO. 9066 AND THE ACT OF MARCH 21, 1942

Petitioner did not contend in the courts below that his exclusion from the area designated in Civilian Exclusion Order No. 34 was outside the authority conferred by Executive Order No. 9066 and the Act of March 21, 1942; but since the point is raised in this Court (Pet. 25), the authority for the Order will be briefly stated.

Executive Order No. 9066 (*infra*, pp. 76–78) provided that "any or all persons may be excluded" from the duly prescribed military areas which it authorized to be established and that with respect to all such areas "the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." The Civilian Exclusion Order is directly within the terms of these provisions. As this Court noted in the *Hirabayashi* opinion (320 U. S. at pp. 92, 103), the authority conferred by

the Executive Order was expressed in its preamble to be for the purpose of preventing espionage and sabotage. Public Proclamation No. 1 (*infra*, p. 80), to which the Civilian Exclusion Order refers, states that "the entire Pacific Coast * * * is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations." The facts which rendered this finding a reasonable one have already been referred to. (*Supra*, p. 11.) See also the Government's brief and this Court's opinion in the *Hirabayashi* case. The Executive Order followed closely both in time and content the recommendation of General DeWitt to the Secretary of War and the recommendation to the President by members of Congress, that military authority be used to effect the evacuation of persons of Japanese ancestry from the Pacific Coast states.[17] There is accordingly no room for doubt that the evacuation of these persons was specifically contemplated.

Since exclusion was within the authority of Executive Order No. 9066, it was also authorized by Congress. This Court determined in the *Hirabayashi* case "that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066." 320 U. S. at p. 91. It follows that Congress intended to authorize the pro-

[17] *Final Report* of General DeWitt, p. 33; *Preliminary Report*, pp. 3–5.

mulgation of any order that was within the scope of the Executive Order. Furthermore, the legislative history of the Act of March 21, 1942, shows that Congress specifically intended to authorize orders excluding persons of Japanese ancestry, both American citizens and aliens, from the West Coast Military Areas. *Hirabayashi* v. *United States*, at p. 91; S. Rep. 1171, 77th Cong., 2d sess., p. 2; H. Rep. 1906, 77th Cong., 2d sess., p. 2; 88 Cong. Rec. 2722–2726.

II

IT WAS CONSTITUTIONAL FOR CIVILIAN EXCLUSION ORDER NO. 34 TO PROHIBIT THE PRESENCE OF PERSONS OF JAPANESE ANCESTRY IN THE DESIGNATED AREA AFTER A SPECIFIED DATE

1. The Order was a valid exercise of the war power.—This Court ruled in the *Hirabayashi* case that the joint war power of the President and the Congress is sufficiently broad to cover a measure which there is "any substantial basis" to conclude is "a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion." 320 U. S. at p. 95. We submit that there was a substantial basis for concluding that the Exclusion Order, equally with the curfew which was sustained in the *Hirabayashi* case, was such a necessary protective measure.

The pertinent circumstances were in large part the same as those which rendered appropriate the imposition of the curfew. The initiation of the exclusion program by the promulgation of the first Civilian Exclusion Order occurred on the same date as the curfew proclamation, and the violation by the petitioner herein occurred during the same month as Hirabayashi's violation. With respect to the conditions then prevailing this Court has said (320 U. S. at pp. 94, 96, 99):

> * * * That reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted
>
> * * * * *
>
> * * * The German invasion of the Western European countries had given ample warning to the world of the menace of the "fifth column." Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor. At a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern.
>
> * * * * *
>
> * * * Whatever views we may entertain regarding the loyalty to this country of

> the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it. [Court's footnote omitted.]

The concurring Justices indicated no difference of view with respect to these justifications for the curfew.

The appropriateness of the exclusion rests on the additional fact that the danger to be apprehended from any disloyal members of the population of Japanese ancestry would remain great if such persons should continue to reside on the West Coast. It is obvious that the opportunity for espionage and sabotage, as well as the aid to be derived therefrom by the enemy, would be greatest in the region most exposed to the striking power of Japan. The curfew was a method which dealt only partially with the danger, while the exclusion removed the danger during all hours and without resort to the impossible task of individual surveillance. A group of over 110,000 persons was in-

volved, in which the number and identity of the possible disloyal members were not known. Prevention of acts of espionage and sabotage through surveillance obviously was fraught with extreme difficulty, if not wholly impossible.

On the basis of pertinent data a judgment to resort to exclusion was made by those responsible for military and protective measures. Differences of opinion as to the correctness of that judgment cannot take from it the substantial basis upon which it rested.

In the court below petitioner argues, as he does here (Pet. 7), that his exclusion was nevertheless a violation of the due process clause of the Fifth Amendment. His argument appears to be based partially upon the proposition that, aside from the racial discrimination involved in the exclusion measure, it is an unreasonable method of preventing espionage or sabotage to exclude from a substantial portion of the country any large group of residents because of apprehension that a minority of them might engage in disloyal acts. It is true that the prohibition of residence of a group of persons in an area in which they have established homes, relationships, employment, and business enterprises, is a more stringent deprivation to the persons affected than the curfew involved in the *Hirabayashi* case, or than the establishment of fire lines during a fire and the confinement of people to their homes

during an air raid alarm, which this Court cited in sustaining the curfew. 320 U. S. at p. 99. Nevertheless, in view of the overwhelming importance of securing the country against invasion and the undoubted assistance which could be rendered to an invading enemy by persons within the community, the exclusion of loyal persons along with the disloyal is not an unreasonable infringement of liberty or a denial of due process where, as here, there were strong grounds to believe that the identity of the disloyal persons could not be readily ascertained and that invasion was threatened. It is to be noted that there is no implication in either the majority or the concurring opinion in the *Hirabayashi* case that the exclusion orders might be a violation of due process.

Measures coming within the war power do not violate the Fifth Amendment, whether or not they could be sustained in normal times, although that Amendment must be considered in determining the validity of a particular exercise of the war power under the circumstances which evoke it. As is true with respect to other governmental powers the limitations imposed by due process upon the war power mark the boundaries of the power itself. *Cf.* Mott, *Due Process of Law* (1926), cc. XVII, XVIII. To call in question the exclusion program under the Fifth Amendment is, therefore, to challenge in another way the sufficiency of the war power to support the action taken by the President and Congress and by the military authorities.

This Court has made clear the great scope of the war power and that the limitations imposed by due process of law permit the exercise of a correspondingly wide discretion.

> * * * the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on. * * * The measures here challenged are supported by a strong presumption of validity * * * As applied * * *, the statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment. *Highland* v. *Russell Car Co.*, 279 U. S. 253, 262.

In the *Selective Draft Law Cases*, 245 U. S. 366, the Court, although it did not refer specifically to the Fifth Amendment, denied the limiting effect of several other Constitutional provisions with respect to the power of Congress to require military service, with all of its sacrifices on the part of individuals who are drafted. 245 U. S. 389–390.

As was said in the *Hirabayashi* case, if an order "was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty." 320 U. S. at p. 99. The Fifth Amendment protects the individual from arbitrary deprivations in war as in peace; but it does not invalidate measures, however extreme, which respond reasonably to the necessities of war.

The fact that the exclusion measure adopted was directed only against persons of one race does not invalidate it under the circumstances surrounding its adoption. Persons of Japanese ancestry were not marked out for separate treatment because of their race but because other considerations made the ethnic factor relevant. As this Court noted in the *Hirabayashi* case (at p. 101):

> The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan.
>
> * * * We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.

Certainly the proportion of persons who might render aid to the enemy in the event of a Japanese invasion was reasonably thought to be greater in the West Coast population of Japanese ancestry than in the West Coast population as a whole or in groups of other ancestries living in that area at the time the Exclusion Order was issued. The bases for this conclusion have already been fully stated by this Court. *Hirabayashi* v. *United States*, 320 U. S. 81, 96–99.

2. *The Act of March 21, 1942, did not contain an unconstitutional delegation of legislative power to order the exclusion.*—On this point again the *Hirabayashi* case is controlling. This Court there noted that the exclusion Order, like the curfew, was specifically contemplated by Congress. Therefore in imposing the exclusion measure, as with respect to the curfew, the Military Commander exercised discretion only with regard to "whether, under the circumstances, the time and place were appropriate for the promulgation of the * * * order and whether the order itself was an appropriate means of carrying out the Executive Order for the 'protection against espionage and against sabotage' to national defense materials, premises and utilities." *Hirabayashi* v. *United States*, at p. 92. Further criteria of lawful delegation, stated in the *Hirabayashi* opinion, are also satisfied. The Executive Order prescribed the standard of protection against espionage and sabotage, which Congress also contemplated in enacting the statute, to govern the actions of the military authorities. This standard was followed in determining upon the Exclusion Order and Public Proclamation No. 1 upon which it rested. *Supra*, p. 19. The legislative function was performed (*Hirabayashi* v. *United States*, at p. 105) and the legislative will was followed.

III

THIS COURT SHOULD NOT IN THE PRESENT CASE CONSIDER THE LAWFULNESS OF ANY DETENTION TO WHICH PETITIONER WOULD HAVE BEEN SUBJECTED IF HE HAD OBEYED CIVILIAN EXCLUSION ORDER NO. 34

Those provisions of Civilian Exclusion Order No. 34 of May 3, 1942 (*infra*, pp. 88–89), which petitioner undertook to disregard, prescribed that he be excluded from the local area in which he lived and that it would be an offense for him to be found there after noon of May 9, 1942. The accompanying written Instructions referred to the provision of "temporary residence elsewhere," to "evacuation" by the time stated in the order, and to "departure for" and "transfer to" the Assembly Center. They and the order required that a responsible member of each family and each individual living alone report to a Civil Control Station on either May 4 or May 5. They also forbade changes of residence after noon on May 3. In challenging his allegedly threatened "internment" and "imprisonment" (Pet. 8, 10), petitioner contends in effect that the exclusion feature of the order, even though in itself valid, was so coupled with other measures to accomplish the exclusion as to force him, if he should obey the order, to their detriments which could not lawfully be imposed upon him.

The Government does not dispute that petitioner, had he obeyed all of the provisions of the

order and the accompanying Instructions, would have found himself for a period of time, the length of which was not then ascertainable, in a place of detention. It does not follow that this detention, which did not become actual, is an issue in the present case. It was solely and specifically petitioner's unlawful presence in the area which was charged in the information (R. 1). His defense at the trial was no broader than this charge and no evidence was introduced by the Government to meet wider issues. The majority at least of the Circuit Court of Appeals (R. 33–35) considered the question to be simply the validity of petitioner's exclusion from the defined area. Petitioner was not accused or convicted of eluding detention or of not reporting for evacuation; he was solely charged with remaining where he had no lawful right to be. His desire was to stay there (R. 21). The only relevant question is whether the provision of the order which forbade his presence is valid. Had he submitted to evacuation, petitioner could have brought other proceedings to challenge his detention.

1. *The narrow scope of the information precludes consideration of prohibitions of the order not alleged to have been violated.*—The prohibition of the order which petitioner was accused of having violated was that which made it an offense for him to be "found in the above area after * * * May 9, 1942," or, as stated in the information, to "remain in that portion of Mil-

itary Area No. 1 covered by Civilian Exclusion Order No. 34 * * * after * * * May 9, 1942" (R. 1). He is not accused in this proceeding of any other omission or conduct or of violating any other phase of the exclusion program. If, as we have already urged in Points I and II, his exclusion from the designated area was valid, he may not urge the Court to withdraw the legal means of enforcing this central military objective of the exclusion program by now contending that if he had left the area independently he might either have been accused in some other proceeding of having violated Public Proclamation No. 4 or other provisions of the order and Instructions, or have found himself in physical detention. If prosecution had resulted from his independent action, he could have defended the disobedience charged against him; if he had been detained instead, habeas corpus would have been available to test the validity of his detention. If, on the other hand, petitioner had obeyed the Civilian Exclusion Order in all respects, he could have brought habeas corpus proceedings upon reaching the Assembly Center. Whatever his course, appropriate remedies were saved to him.

Petitioner's contention in striking at the provisions of the order which would have led to detention, as an incident to his attack on the sufficiency of the information, is in substance that it was impossible to charge a violation of the order

based upon his remaining in the area. He contends in effect that he could not be accused of remaining in the area without also involving other, allegedly invalid parts of the order and Instructions and that, even though the exclusion was valid, yet he and all others in similar circumstances could remain, because as means of accomplishing the exclusion the order laid out a course which would have involved detention in an Assembly Center.

It seems clear that petitioner should not now be permitted to seek indirectly to nullify the vital military measure of exclusion of persons of Japanese ancestry from the West Coast area because of the claimed invalidity of accompanying features of the exclusion program. The exclusion was a measure taken under the urgency of military necessity, based upon a threat of invasion, at a critical point in the war. It would be a misapplication of the doctrine of inseparability, scarcely consistent with the national security or welfare, to hold that this measure may now be attacked, not because of its own invalidity but because of the alleged unconstitutionality of the means adopted to effectuate it, when violation of these means is not charged.

This Court, in determining whether the constitutionality of a legislative provision may be judged separately from that of other provisions which accompany it, has followed the criterion of whether the particular provision, even though its

requirements bear an administrative relationship to the others, has an "essential character and * * * capacity to stand alone." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 433. See also *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 234–235; *Blackmer* v. *United States*, 284 U. S. 421, 442. The rule that the validity of the penal provisions of a statute will not be determined in a suit in which they are not involved, even though the suit requires determination of the validity of other provisions which the penal provisions were designed to enforce, is a familiar application of the foregoing principle. *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 177; *Ohio Tax Cases*, 232 U. S. 576, 594.

It is true that in the foregoing instances of application of the doctrine of separability the parties seeking to challenge the separable provisions were not subjected to actual disadvantage by reason of the existence of these provisions, whereas petitioner was confronted with alternative courses of action which involved either a violation of some feature of the exclusion program or submission to evacuation accompanied by detention. It does not follow from this, however, that petitioner became entitled to raise the issues relating to detention in this proceeding, which results from the alternative he adopted. On the contrary, the issue is the one

of exclusion, which responds to the charge in the information and to the conduct in which he engaged.[18]

2. *This criminal case is in any event not an appropriate proceeding in which to attack the validity of phases of the evacuation program not involved in petitioner's violation.*—This Court has recently held in *Yakus* v. *United States*, 321 U. S. 414, that Congress may provide that one aggrieved by a regulation of the Office of Price Administration must promptly pursue an expedited statutory, administrative and civil remedy, and that if he omits to do so, he cannot thereafter question the lawfulness of the administrative order in a prosecution for its violation. In *Falbo* v. *United States*, 320

[18] In consequence of his violation, by arrangement subsequently made, petitioner was actually confined in an Assembly Center. His custody was transferred from the civil to the military authorities pending trial in the instant proceeding; and he was on June 18, 1942, prior to the filing of his demurrer, taken by the military authorities to the Tanforan Assembly Center. He was detained there, except during his attendance at the trial, until he was sentenced on September 8, 1942. When he was placed on probation by the trial court on September 8, a term of the probation was that he should comply with the orders respecting his evacuation and detention. Accordingly, he returned to the Tanforan Assembly Center and was transferred on September 26, 1942, from there to the Central Utah Relocation Project. He was granted seasonal leave on November 21, 1942. This leave was extended several times and finally was, on his application, changed on February 4, 1944, to indefinite leave. Petitioner is now residing in Salt Lake City, Utah.

U. S. 549, it was held that one who was ordered to report for assignment to work of national importance under the Selective Training and Service Act must obey and may not, in a prosecution for his failure to do so, defend on the ground that he was erroneously classified by his Local Board in a proceeding that was not fairly conducted. The *Yakus* case, of course, rests upon an explicit statutory provision and the *Falbo* decision involves, not the alleged invalidity of a statute or general regulation, but the action of the authorities in an individual case. Nevertheless, both cases compel resort to an appropriate alternative course of conduct, precluding the defense of invalidity of administrative action in a prosecution for violation. An important factor in both decisions was the strong need of protecting vital governmental war operations against disregard of regulations and orders, the invalidity of which had not been previously established.

The availability of habeas corpus to the petitioner as an appropriate means of testing the validity of any detention to which he might have been subjected in connection with his evacuation, as well as afterward, cannot be doubted. The courts were open to petitioner to seek a writ of habeas corpus at any time. In this case, however, petitioner was charged in a criminal proceeding,

and we do not urge that he is not entitled in such proceeding to contend that his exclusion was invalid.[19] Since, however, he would have had an obvious means of testing the legality of a separable feature of the evacuation, namely the detention to which he might have been subjected, we believe it is proper to urge that this means should be held to be exclusive.

Weighty considerations frequently enter into judicial judgments with respect to the propriety of interferences by the courts with governmental processes, or of adjudications afterward which would establish the invalidity of such processes. Some official acts, usually denominated "political," are totally immune from judicial scrutiny. *Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U. S. 118; Dodd, *Judicially Unenforceable Provisions of Constitutions* (1931), 80 U. Pa. L. Rev. 54, 84, 1 Selected Essays on Constitutional Law 355, 387. With others, including the sale of property seized by the Government during wartime as enemy-owned (*Stochr* v. *Wallace*, 255

[19] *Supra*, pp. 29–33. Suit to restrain enforcement of the Exclusion Order might well, under all the circumstances, have been met with a discretionary determination by the court that, however great the prospective loss to the petitioner, the court should not undertake to interfere with a military operation. For a summary of the applicable doctrines see 4 Pomeroy, *Equity Jurisprudence* (4th ed., 1919), secs. 1750–1751.

U. S. 239, 245–246), the courts decline to interfere through preventive decrees or writs (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Newport News Shipbuilding & Drydock Co.* v. *Schauffler*, 303 U. S. 54; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134)[20] or through withholding authorized judicial aid to administrative proceedings during their course. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501. Closely allied are the cases which refuse judicial review of administrative acts until administrative remedies have been exhausted (*Gorham Mfg. Co.* v. *State Tax Commission*, 266 U. S. 265, 269–270; *Myers* v. *Bethlehem Shipbuilding Corp.*, *supra*, at pp. 50–51) or compel resort to appropriate administrative proceedings in preference to parallel judicial remedies. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; compare *Brown Lumber Co.* v. *L. & N. R. Co.*, 299 U. S. 393.

The consequences for the future of holding in this case that disobedience of the exclusion order was a proper means of testing its validity might be grave. It is quite apparent that evacuation of the Japanese population from the Pacific Coast,

[20] Especially delicate questions are presented when a Federal court is asked to enjoin state action, and judicial self-denial is correspondingly greater, even as against a claim of threatened unconstitutional action. *Matthews* v. *Rodgers*, 284 U. S. 521 (injunction against collection of allegedly unconstitutional state tax *held* improper even though sole state remedy was action to recover taxes paid under protest); *Douglas* v. *Jeannette*, 319 U. S. 157.

deemed vitally necessary by the Military Commander, would have been frustrated if disobedience had been general. We submit that the basic *ratio decidendi* of the *Falbo* and *Yakus* cases is that there are times when it is necessary for the Government to act first and litigate afterward, with respect to emergency matters which can fairly be determined in that manner. The corollary is that the citizen must obey and then seek his remedy; and if he fails to obey he cannot be relieved of the consequences of disobedience. If there are such times, surely the spring of 1942 on the Pacific Coast was one; and the issue of detention in the course of evacuation could well await litigation not precipitated by disobedience to the exclusion itself.

3. *The relocation phase of the exclusion program is not involved in this case.*—It is clear in any event that this proceeding does not involve any detention to which evacuees have been subjected since the time of petitioner's violation as a means of furthering their final relocation rather than as a method of securing their removal from the West Coast area to Relocation Centers. We have contended that none of the detention of evacuees which has been involved in the exclusion program is properly in issue in this case; for the issue framed by the information does not embrace it, no evidence relating to it was introduced at the trial, and more appropriate proceedings have at all times been available whereby petitioner could have challenged the detention, had he wished to do so. Even

if this contention is wrong and petitioner should be held to be entitled to call in question the detention which attended the removal of the evacuees and compelled their residence in Assembly Centers pending more permanent provision for them, he cannot seek to avoid his conviction by attacking a still later phase of the exclusion program which had not developed at the time of his violation and to which he might not have been subjected.

Petitioner could not have known at the time he disregarded Civilian Exclusion Order No. 34 by failing to report for evacuation on May 9, 1942, that detention in a Relocation Center, of indefinite duration, might follow detention in an Assembly Center if he should comply; nor is it certain that in his case it would have. On May 30, 1942, the date of the offense which is charged in the information, Civilian Restrictive Order No. 1 of May 19, 1942, (*infra*, pp. 93–94), which required persons of Japanese ancestry residing in Relocation Centers to remain there, gave notice that detention outside an Assembly Center was possible. Not until May 26, 1942, however, were any evacuees actually transferred from Assembly to Relocation Centers (*infra*, p. 70); and none of those from the Tanforan Center, to which petitioner would almost certainly have been taken, were moved until September of that year (*supra*, p. 9). The War Relocation Authority was created March 18, 1942; but the program of Relocation Centers was not given permanent sanctions until Public Proclamation

No. 8 of June 27, 1942 (*infra*, pp. 94–97). In the meantime Civilian Restrictive Order No. 2 of May 20, 1942 (*infra*, p. 69) inaugurated the agricultural work group program for some of those in the Assembly Centers. Civilian Restrictive Orders Nos. 3 and 7, issued prior to May 30, 1942 (*infra*, p. 70), resulted in the temporary release of a limited number of evacuees, including a few of those at Tanforan, and some of these releases were later made permanent (*infra*, p. 74). The War Relocation Authority's program for the indefinite release of inhabitants of Relocation Centers came into actual operation August 11, 1942, when authority to issue such releases was conferred upon it (*infra*, p. 72).

In view of this history, it cannot be asserted upon any realistic basis that petitioner's violation could have been motivated by a desire to avoid detention other than that in an Assembly Center or that any other detention need in fact have occurred in his case had he obeyed the Exclusion Order. The relocation phase of the exclusion program, including the detention of evacuees in Relocation Centers, is a separate aspect of the whole program, which was not present in a definite sense in the situation that confronted petitioner at the time of his violation. If detention in a Relocation Center had later come to apply to him, he could, of course, have brought habeas corpus to challenge its continuance. *Ex parte Endo*, No. 70, this Term. So hypothetical an issue, as respects petitioner, is not present in this case.

IV

IF THE QUESTION IS PRESENTED, THE DETENTION TO WHICH PETITIONER WOULD HAVE BEEN SUBJECTED IN CONNECTION WITH HIS EVACUATION HAD HE OBEYED THE EXCLUSION ORDER, WOULD HAVE RESULTED FROM REGULATIONS COMING WITHIN THE WAR POWERS OF THE PRESIDENT AND THE CONGRESS

1. *The decision to accompany exclusion with the detention of evacuees pending their relocation was made after other methods had been employed unsuccessfully.*—The basic considerations which led to the substitution of controlled evacuation for self-arranged migration, so far as information is available, are referred to above, at pp. 13–14. One reason was the failure of self-arranged migration to accomplish the removal from the West Coast area of any considerable number of persons of Japanese ancestry. Not until Public Proclamation No. 4 (*infra*, pp. 86–87) had been promulgated on March 27, 1942, and had given notice of the termination of self-arranged migration and of the inauguration of group evacuation was there any considerable movement on the part of persons of Japanese ancestry to the interior. Of the net total of 4,889 such persons who left Military Areas Nos. 1 and 2 pursuant to their own arrangements (*infra*, p. 63), only 2,005 reported their intention to leave Military Area No. 1 before the issuance of Public Proclamation No. 4. *Final Re-*

port, p. 107. The Proclamation precipitated a rush of registrations for self-arranged evacuation, but it is not known how many persons carried out their intention to leave during the two days following the issuance of the Proclamation, before its prohibition of further migration became effective. There was no further opportunity given for the persons affected throughout Military Area No. 1 to leave under their own arrangements or, in the alternative, enter reception centers voluntarily.[22]

As has been stated (*supra*, p. 7), Civilian Exclusion Order No. 1, applicable to a small territory in the State of Washington, permitted self-arranged migration during the five days following its promulgation on March 24, 1942. The order applied to 258 persons, none of whom took advantage of the opportunity to migrate. Instead, these persons were taken to Assembly and later to Relocation Centers. *Final Report*, pp. 49, 363. Thereafter the Civilian Exclusion Orders followed the pattern embodied in Civilian Exclusion Order No. 34, which petitioner violated. *Supra*, p. 7.

The inadequacy of self-arranged migration to accomplish the removal of persons of Japanese ancestry was caused partly by fear on their part of violence which their migration to the interior might have precipitated. This situation demonstrated, according to General DeWitt, that

[22] Previously, on March 21, 1942, a group of 2,100 persons, recruited from the Los Angeles area, went voluntarily to the Manzanar Assembly Center to assist in its completion. *Final Report*, p. 48.

"voluntary migration would be but one phase of the over-all program—never a complete and satisfactory solution." Nevertheless voluntary migration "was encouraged and assisted * * * until such time as it became clearly evident" that it "was creating major social and economic problems in the areas to which the Japanese were moving." *Final Report*, p. 101.[23] Those who responded to the encouragement were mainly those "with some financial independence or with relatives and friends in the area of destination." Only $10,200 in all were expended prior to June 5, 1942, in assisting 125 individuals and families—92 during the period of "voluntary evacuation"—who applied for such aid. *Idem*, p. 104.

[23] "Prior to March 12" when the Wartime Civil Control Administration was established, however, "it was hoped that the evacuation would be characterized primarily by a voluntary exodus." Two reception centers were planned for the temporary accommodation of those who were unable to provide for themselves or who declined to leave until forced to do so. These were intended to have a capacity of 10,000 persons each. *Final Report*, p. 44. It was specifically stated in earlier documents that the provision of shelter by the Army would be for only those evacuees whose resettlement was not arranged through their own efforts or those of private agencies. Memorandum of February 20, 1942, from Assistant Secretary of War John J. McCloy to General DeWitt, printed in the *Final Report*, at p. 29. General DeWitt's own Final Recommendations with respect to the evacuation, dated February 14, envisaged temporary voluntary internment under guard, followed by resettlement, for those Japanese-American citizens who would accept it, with exclusion from the Military Areas and some public assistance for those who would not. Japanese aliens were to be subjected to compulsory internment. *Final Report*, at p. 37.

The reasons for the decision to terminate self-arranged migration from Military Area No. 1 on March 29, 1942 are stated to have been "First, * * * to alleviate tension and prevent incidents involving violence between Japanese migrants and others" and "Second, * * * to insure an orderly, supervised, and thoroughly controlled evacuation with adequate provision for the protection of the persons of evacuees as well as their property." (*Final Report*, p. 105.)

> Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration. (*Final Report*, pp. 43–44.)

In contrast to the lack of effective provision for the migrants which characterized the self-arranged migration, the evacuation to Assembly Centers provided "shelter and messing facilities and the minimum essentials for the maintenance of health and morale." *Final Report*, p. 78. Further information concerning the Assembly Centers is given *infra*, p. 68.

2. *The detention to which petitioner might have been subjected came within the authorization of Executive Order No. 9066 and the Act of March 21, 1942.*—The detention in question, viewed as of the time of petitioner's violation, was of uncertain duration in an Assembly Center. It had become apparent by May 30, 1942 that further evacuation would be to Relocation Centers, but the duration of further detention and the methods of securing release were not yet known, except that temporary release for agricultural work was possible. (*Supra*, pp. 38–39).

Executive Order No. 9066 provides that, with respect to the military areas authorized to be prescribed, "the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." This Order also authorizes "the Secretary of War and the * * * Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies," as well as "to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secre-

tary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order" (*infra*, p. 77). Criminal penalties for the violation of regulations with respect to the right to "enter, remain in, leave, or commit any act in any military area or military zone prescribed under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander" were specifically authorized by the Act (*infra*, p. 78).

If the detention of evacuees was within the Executive Order, it was within the Act for reasons already stated and approved by this Court in the *Hirabayashi* case (*supra*, pp. 19–20). Whether detention was within the Order depends (1) upon the terms of the Order, just recited, which support it, and (2) upon the relation of detention to the purpose sought to be accomplished, including the evacuation which, as this Court has stated, was specifically envisaged by Congress at the time the Act was passed. *Hirabayashi* v. *United States*, 320 U. S. 81, at pp. 90–91.

The basic, expressed purpose of Executive Order No. 9066 was to authorize "every possible protection against espionage and against sabotage

to national-defense material, national-defense premises, and national-defense utilities." The finding that the requirements of Civilian Exclusion Order No. 34 were necessary for this purpose was made by references in the Exclusion Order and in Public Proclamation No. 4 to Public Proclamation No. 1 which had established Military Area No. 1 after reciting the danger of espionage and sabotage in connection with a threatened invasion (*infra*, p. 66). The adequacy of such a reference to Public Proclamation No. 1, containing the requisite findings, was determined by this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, at p. 103. In Public Proclamation No. 4 it was found, in addition, that "it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration."

The detention in Assembly Centers, consequently, was a means of accomplishing the evacuation and of mitigating the harmful consequences of the exclusion which was ordered for the purpose of preventing espionage and sabotage on the West Coast. Hence the detention was a collateral measure closely related to the exclusion and, as such, came within the purpose as well as the literal terms of Executive Order No. 9066. If Congress understood that the Executive Order, which it ratified, authorized measures to deal with the consequences of the evacuation which was en-

visaged, these measures came also within the Act of March 21, 1942. It is not to be doubted that Congress conferred upon the military authorities in exercising their powers, the authority to execute them with reasonable regard to the conditions that might be precipitated by the measures they were directed to take.

3. Assuming that detention as a concomitant to evacuation was within Executive Order No. 9066 and the Act of March 21, 1942, the authority to decide upon it was not unconstitutionally delegated to the military authorities.—It is not necessary to consider whether the President, acting alone, could have issued or authorized the detention orders; for his action in promulgating Executive Order 9066 was ratified by Congress. The question is whether Congress and the Executive, acting together, could leave it to the designated Military Commander to appraise the relevant conditions and on the basis of that appraisal to determine upon a method of evacuation involving detention, as an appropriate means of carrying out the Order. *Hirabayashi* v. *United States*, 320 U. S. 81, 92.

The question is somewhat different from that surrounding the delegation of authority to prescribe curfews and the evacuation itself, both of which were specifically contemplated by Congress when it adopted the Act of March 21, 1942 (*Hirabayashi* case, at pp. 91, 102). The discretion con-

ferred with respect to both these measures related solely to whether, when, and where they should be applied. The authority to impose detention, on the other hand, involved a choice of measures not specifically contemplated but falling within the stated general purpose, as well as a judgment of whether, when, and where to act.

The question, of course, is whether the provisions of the Act of March 21, 1942, if understood to afford a basis for the temporary detention of evacuees from a military area, are sufficiently definite to provide a standard which prevents the delegated power from being legislative in the constitutional sense. In determining this question the provisions of Executive Order No. 9066 and Public Proclamations Nos. 1 and 2, as well as those of the Act itself, may be considered, since all were approved by Congress (*Hirabayashi* case, at pp. 91, 102–103). These provisions, as previously noted, establish the prevention of espionage and sabotage as the purpose of the measures which are authorized. Exclusion was specifically authorized and the Order authorized such steps as the Military Commander might deem advisable to enforce compliance with the restrictions that might be imposed and as might be required to provide for persons excluded from an area (*supra*, p. 44).

In the light of the breadth of the delegations of authority, coming under the war power and related

powers, which this Court has recognized as proper (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–322; *Hirabayashi* v. *United States*, 320 U. S. 81, 104), we submit that the delegation of authority to prescribe measures reasonably found to be necessary to guard against consequences, harmful to the war effort, which might result from the exercise of powers undoubtedly conferred by the Act, was not unconstitutional.[24] Under such a delegation there is not "an absence of standards for the guidance" of administrative action, such as would make it "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed" and alone would justify this Court in overriding the choice by Congress "of means for effecting its declared purpose." *Yakus* v. *United States*, 321 U. S. 414, 426. A court can determine whether given measures are related to the prevention of espionage and sabotage and to a specifically authorized exclusion.

4. *The detention of evacuees in an Assembly Center as a concomitant to their removal is within the scope of the war power and is consistent with due process of law.*—The detention here in question, as previously pointed out (*supra*, p. 44), is

[24] "Where the orders under the present Act have some relation to protection against espionage and against sabotage, our task is at an end." Concurring opinion of Mr. Justice Douglas in *Hirabayashi* v. *United States*, 320 U. S. at p. 106.

detention in an Assembly Center until such time as further provision for the evacuees might be made, which was determined upon as an essential measure in connection with the exclusion.

It should be stressed that the Assembly Centers provided temporarily for the evacuees and have long since served their purpose. Such centers no longer exist. Evacuees first entered an Assembly Center on March 31, 1942. During the following months these centers received persons of Japanese ancestry, old men and women, family groups, young men and women, and children of various ages. The 14 Assembly Centers provided in all for 92,193 persons (*infra*, p. 74). They were supplied with doctors, dentists, nurses, hospitals and temporary facilities for the care and maintenance of the evacuees during the period required for the construction and equipment of more permanent Relocation Centers which were being made ready with all possible speed. The Relocation Centers were to be places of more extended residence while the program of relocation in normal communities was being worked out by the Government. The Assembly Centers, accordingly, were an intermediate phase of the program between evacuation and transfer to Relocation Centers. All evacuees had been transferred by November, 1942, and no one has since been detained in an Assembly Center.

Petitioner did not seek to show, by evidence or otherwise, that detention in Assembly Centers as a method of accomplishing the evacuation was not reasonably appropriate to the basic purpose of exclusion. The alternative which his position seems to suggest is that the evacuation, although compulsory and to be accomplished quickly, should not have been accompanied by any restraint; that the thousands of families and individuals who were involved should have been required to leave their homes in the restricted areas with such assistance as they might voluntarily accept. The result might have been a great mass movement of the persons affected, by all possible means of transportation, or without transportation, entailing great hardship and confusion, and with continued if not increased danger of espionage and sabotage which it was the purpose of the whole program to avert. The result, further, might have been the arrival of many individuals in communities unreceptive to them and without provision for them. It could not have been known when or where they would arrive and under what conditions.

The Assembly Center was reasonably calculated at least to mitigate these hardships and also to avoid the dangers which lay behind the decision to require evacuation. The constitutional validity of the restraint of liberty entailed by the Assembly Center must be judged in relation to the reason-

ableness of the basic purpose and the means available for its execution. The question involves the validity of a particular method adopted for carrying out an exclusion which was itself justified by factors of common knowledge.

Petitioner, in challenging the method used, labors under a heavy burden, particularly when, in the posture which the case has assumed, a decision in accordance with his contention would strike down not only the method adopted but also, in practical effect, the exclusion itself. For if petitioner was wrongfully convicted because detention in an Assembly Center would have resulted from full obedience to the order, and if he could not validly be convicted, as he was, of violating only that feature of the order which prohibited his remaining in the area, then the exclusion, as ordered, was unenforceable by legal means.

Petitioner has not borne the burden which rested upon him. The indications of hostility to the evacuees, which lay at the basis of the decision to impose detention (*supra*, pp. 41–43), have not been negatived. The belief of the military authorities in the danger of violence has not been shown to have been unreasonable. The existence of that belief is undisputed. The Final Report of General DeWitt states that "widespread hostility" had developed "in almost every state and every community. It was literally unsafe for Japanese migrants" (pp. 104–105). The report refers to "one example among many" of

actual threats against evacuees. These are said to have numbered "several thousand." (P. 106.)[25]

The judgment of the military authorities is confirmed by that of the Tolan Committee. Reporting on May 13, that Committee stated:

> Voluntary settlement outside of prohibited and restricted areas has been complicated, if not made impossible for an indefinite period, by the resentment of communities to, what appeared to them, an influx of people so potentially dangerous to our national security as to require their removal from strategic military areas. The statement was repeated again and again, by communities outside the military areas, "We don't want these people in our State. If they are not good enough for California, they are not good enough for us."[26]

In addition, the need of providing adequately for the evacuees during the difficult period of physical transfer to new locations and of readjustment to

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[25] The National Secretary of the Japanese-American Citizens League testified before the Tolan Committee on February 23, 1942, that "in view of the alarming developments * * * all plans for voluntary evacuations" should be discouraged. *Hearings*, Part 29, p. 11137. On March 21, in advance of compulsory migration, 2,100 persons had been recruited from Los Angeles to proceed in a conducted group to the Manzanar Assembly Center, which was still under construction. *Supra*, p. 41.

[26] *Fourth Interim Report*, p. 17. Early instances of hostility on the West Coast itself are referred to in the testimony of witnesses before the Committee. *Hearings*, Part 29, pp. 11137, 11156.

new conditions argued for a controlled migration. Undoubtedly the Government bore a heavy responsibility to the people whom it was uprooting from their homes and accustomed means of livelihood—a responsibility which it was justified in taking strong measures to meet, even at the cost of temporarily restraining the liberty of the evacuees. The needs of the evacuees confronting the military authorities and the appropriateness of the measures adopted to meet these needs, like the danger of violence, were affirmed by the Tolan Committee in the following language:

> While apparent respect for the rights of citizens prompted an early disposition to permit voluntary relocation outside prohibited areas, the seemingly insurmountable obstacles to such a program has led to an emphasis on Federal responsibility for resettlement. Only under a Federal program, providing for financial assistance, protection to person and property and an opportunity to engage in productive work, did it appear possible to minimize injustice."

It may properly be urged, in addition, that the primary purpose of the evacuation, namely the prevention of espionage and sabotage, would have suffered as a result of confusion, disorder, and resentment flowing from an uncontrolled migration of 100,000 persons. As this Court recognized in *Hirabayashi* v. *United States*, 320 U. S. at p. 99.

" *Fourth Interim Report*, p. 17.

there was reason to believe that a disloyal minority existed among the evacuees. Its size and the identity of its members were not known.[28] To force this group suddenly into the interior upon its own resources might well have been to shift the locale of the danger of espionage and sabotage without eliminating it. Although the same danger might have been present to some degree had the self-arranged migration, which preceded the enforced evacuation, been more successful than it was (*supra*, pp. 41–42), the danger would certainly have been at its maximum if an uncontrolled mass evacuation had been ordered.[29]

[28] As of July 29, 1944, it had been determined by the War Relocation Authority after hearing that 1,200 citizens and 328 aliens among the evacuees were disloyal or of sufficiently doubtful loyalty to warrant the denial of leave to depart from Relocation Centers for the balance of the war with Japan. The cases of 792 individuals remained to be determined. These have been segregated at the Tule Lake Relocation Center, together with approximately 10,000 others, citizen and alien, who have applied for repatriation to Japan and who failed to answer or gave unsatisfactory answers to loyalty questions included in a questionnaire submitted to the entire evacuee population in February and March, 1943, and members of the families of all of these. During 1942 and 1943, 365 evacuees were repatriated to Japan by their own desire, as a result of exchange arrangements with the Japanese Government. *Final Report*, pp. 309–328. For further information concerning the evacuee group and the program of segregation of the disloyal and the release of others see the Government's brief in *Ex parte Endo*, No. 70, this Term.

[29] This danger is not referred to in official reports upon the evacuation as it was actually conducted. That it should have received consideration in the light of other factors relied upon seems evident, however.

The detention of persons, whether citizens or aliens, in the interest of the public safety or their own welfare or both, apart from punishment for the commission of offenses, is a measure not infrequently adopted by government.[30] The arrest and detention of persons suspected of crime but presumed to be innocent, with release dependent upon ability to furnish bail, are of daily occurrence, with resulting hardships to blameless victims perhaps comparable in a year's time in the United States to the mental and spiritual sufferings of the Japanese evacuees. See National Commission on Law Observance and Enforcement, *Report on Penal Institutions, Probation and Parole* (1931): *Report of the Advisory Committee*, at pp. 271–279; Hutcheson, *The Local Jail*, 21 A. B. A. J. 81 (1935). The detention of jurors (*State* v. *Netherton*, 128 Kan. 564, 279 Pac. 19), and of material witnesses whose disappearance is feared (*United States* v. *Von Bonim*, 24 F. Supp. 867 (S. D. N. Y.)) is a related phenomenon. Even apart from the emergency of war, but during a proclaimed state of "insurrection", the detention of individuals by

[30] Those afflicted by mental disorder or communicable disease may of course be restrained (*Ex parte Lewis*, 328 Mo. 843, 42 S. W. (2d) 21), and the classes of persons subject to such restraint may be enlarged to accord with developing medical knowledge or social conditions. *Minnesota* v. *Probate Court*, 309 U. S. 270. Carriers of a disease, even though not themselves suffering from its effects, may be restrained for as long as the public health requires. *People ex rel. Barmore* v. *Robinson*, 302 Ill. 422, 134 N. E. 815.

executive action in the interest of order, the courts being open to afford a remedy to persons seeking to challenge their detention, has been sustained by this Court. *Moyer* v. *Peabody*, 212 U. S. 78. *Cf. Sterling* v. *Constantin*, 287 U. S. 378, 400.

The effect of a war in empowering the Government to impose restraints which might be invalid in normal times has often been noted. *Block* v. *Hirsch*, 256 U. S. 135, 150–156; *Meyer* v. *Nebraska*, 262 U. S. 390, 402; *Hirabayashi* v. *United States*, 320 U. S. 81, 93; *Yakus* v. *United States*, 321 U. S. 414, 443. And the war power extends to measures for dealing with the consequences of war in the social and economic order as well as to measures designed to aid in carrying force to the enemy. *Stewart* v. *Kahn*, 11 Wall. 493; *Raymond* v. *Thomas*, 91 U. S. 712; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146. Both as a means of forestalling possible espionage or sabotage and as a method of meeting conditions precipitated by the exclusion of persons of Japanese ancestry from the West Coast, therefore, the controlled evacuation and the detention which it entailed were a valid exercise of the war power.

In essence, the military judgment that was required in determining upon a program for the evacuation was one with regard to tendencies and probabilities as evidenced by attitudes, opinions, and slight experience, rather than a conclusion based upon objectively ascertainable facts.

"There was neither pattern nor precedent for an undertaking of this magnitude and character",[31] at least in this country. Impairment of personal liberty resulted from the decision that was made. It cannot be said, however, even with the benefit of hindsight, that the decision was clearly unreasonable under the circumstances. That being so, it came within the purview of the war power exercised to accomplish the exclusion and did not violate due process of law. To the extent that the consequential detention in an Assembly Center can be questioned in this case, the conclusion should be that the impairment of liberty which was entailed resulted from the use of measures responsibly and reasonably calculated to further a validly inaugurated program based on military necessity.

It is of some significance that not a single person of the thousands detained in Assembly Centers sought release by habeas corpus although, as previously stated, the courts were at no time closed to them. Petitioner alone has challenged the Assembly Center and does so, not as one actually subjected to its restraint, but in a criminal proceeding in which the only charge against him is that he remained in a military area after he had been forbidden to do so. We accordingly revert to our basic position, that the ground of the decision in this case should be only the validity of

[31] Letter of transmittal, *Final Report* of General DeWitt, p. viii.

the exclusion itself; that the validity of the use of Assembly Centers is not here in issue; and that there is no occasion for a decision with respect to a phase of the exclusion program long since ended.

The validity of continued restraint in Relocation Centers, where many of the evacuees now are, is involved in *Ex parte Endo,* No. 70, this Term, and is, we understand, to be heard and considered with the present case.

CONCLUSION

In view of the foregoing considerations, we respectfully submit that petitioner's conviction and the judgment of the court below should be affirmed.

CHARLES FAHY,
Solicitor General.

HERBERT WECHSLER,
Assistant Attorney General,
EDWARD J. ENNIS,
Director Alien Enemy Control Unit.
RALPH F. FUCHS,
JOHN L. BURLING,
Department of Justice.

OCTOBER 1944.

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APPENDIX I

FACTS RELATING TO THE EXCLUSION PROGRAM

A. CIVILIAN EXCLUSION ORDERS

Pursuant to authorization by the Secretary of War[1] to exercise throughout the Western Defense Command the power granted by Executive Order No. 9066 (*infra*, pp. 76–78), Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command, issued Public Proclamation No. 1, dated March 2, 1942 (7 F. R. 2320, *infra*, pp. 79–82). This Proclamation, which recited the military necessity for its provisions, established Military Areas No. 1 and No. 2 within that Command as well as zones within these Areas, and provided that "such persons or classes of persons as the situation may require" would by subsequent orders "be excluded from all of Military Area No. 1" and from designated zones in Military Area No. 2.

Military Area No. 1 comprised the western portion of the States of California, Washington, and Oregon, and the southern portion of Arizona.

Subsequent proclamations[2] established Military Areas 3, 4, 5, and 6 in Idaho, Montana, Nevada,

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[1] See letter of authorization, dated February 20, 1942, printed in *Final Report, Japanese Evacuation from the West Coast*, 1942, by Lieutenant General John L. DeWitt (Government Printing Office, 1943), hereinafter termed *Final Report*, p. 25.

[2] Public Proclamation No. 2, March 16, 1942, 7 F. R. 2405, *infra*, pp. 83–86; Public Proclamation No. 6, June 2, 1942, 7 F. R. 4436.

and Utah and provided that persons of Japanese ancestry would be excluded from limited zones within these areas and from the California portion of Military Area No. 2, constituting all of that State not included in Military Area No. 1.

Executive Order No. 9066, upon which the foregoing Proclamations and the subsequent Civilian Exclusion Orders were based, was issued by the President on February 19, 1942 (*infra*, pp. 76–78). It recited the necessity for protection against espionage and sabotage and authorized the Secretary of War and Military Commanders designated by him, whenever such action was necessary—

> * * * to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. * * *

The Order further authorized the Secretary of War to provide transportation, food, shelter, and other accommodations for the residents of a military area who were excluded from it. It authorized and directed the Secretary of War and the designated Military Commanders "to take such other steps as he * * * [or they] may deem advisable to enforce compliance with the restrictions applicable" to each designated military area.

The Executive Order, as was held in *Hirabayashi* v. *United States*, 320 U. S. 81, was ratified by the Act of March 21, 1942, 56 Stat. 173, 18

U. S. C., Supp. III, Sec. 97a, *infra*, p. 78. The Act provided in effect that whoever should knowingly violate any restriction applicable to a military area or zone prescribed by the Secretary of War or a Military Commander under the authority of an Executive Order of the President should be guilty of a misdemeanor.

On March 11, 1942, General DeWitt established the Wartime Civil Control Administration, which was headed by an Assistant Chief of Staff and which included representatives of various civilian agencies. The Administration was directed "to provide for the evacuation of all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2 of the Pacific Coast with a minimum of economic and social dislocation, a minimum use of military personnel and maximum speed; and initially to employ all appropriate means to encourage voluntary migration."[3]

To achieve the objective of securing voluntary migration, the Wartime Civil Control Administration established offices throughout the affected areas to encourage migration to the interior. These offices were empowered to pay the cost of transportation of migrants and undertook to secure employment opportunities for them. However, they encouraged migration only to points where the occurrence of acts of violence against

[3] *Final Report*, p. 41. See also *Preliminary Report*, etc., *Report of the Select Committee Investigating National Defense Migration of the House of Representatives*, House Report No. 1911, 77th Cong., 2d Sess. (hereinafter termed *Preliminary Report*), p. 10.

the migrants was unlikely.[4] All together, 4,889 persons migrated under this part of the program. In addition, centers were established in the Military Areas where persons who wished to migrate could be sheltered if they did not find it feasible to leave immediately. Approximately 2,100 persons proceeded to one of these centers as voluntary migrants.[5]

The Wartime Civil Control Administration took measures through the Farm Security Administration and the Federal Reserve Bank of San Francisco to assist those migrants and the evacuees who subsequently left the areas under compulsion to dispose of their property and adjust their affairs with minimum financial detriment.[6] Throughout the whole program an attempt was made to preserve family units intact.[7]

On March 18, 1942, by Executive Order No. 9102 (7 F. R. 2165), the President established the War Relocation Authority to formulate and carry out a program for the removal of evacuees from the areas established pursuant to Executive Order No. 9066, their relocation in appropriate places, their maintenance, their employment at useful work, and the supervision of their activities. The Authority was given power to prescribe regula-

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[4] *Final Report*, pp. 43, 104.

[5] *Final Report*, pp. 44, 48.

[6] *Fourth Interim Report of the Select Committee Investigating National Defense Migration of the House of Representatives*, House Report No. 2124, 77th Cong., 2d Sess. (hereinafter termed *Fourth Interim Report*), pp. 4–5; *Final Report*, pp. 53–54.

[7] *Final Report*, p. 77.

tions to execute its program and was directed to consult with the Secretary of War in regard to its measures.

Civilian Exclusion Orders, carrying out the compulsory evacuation of Military Area No. 1 and the California portion of Military Area No. 2, which had been foreshadowed in the previous Public Proclamations,[8] were issued at intervals from March 24, 1942, the date of Order No. 1, to July 22, 1942. Civilian Exclusion Order No. 34, which petitioner was convicted of violating, was one of this series and was issued, as previously stated, on May 3, 1942.

Each order, of which there were 108 in all, covered a designated territory. Prior to its issuance a Civil Control Office or Station was established in the territory covered and was staffed by representatives of civilian agencies, including physicians and social workers to assist the evacuees in various respects.[9] Each order required that all persons of Japanese ancestry "be excluded" from the designated territory after a day six days subsequent to that of the issuance of the Order; that "a responsible member of each family" and each individual living alone in the

[8] No orders were issued with respect to the minute areas in Idaho, Montana, Nevada, and Utah which were designated in Public Proclamation No. 2 as zones from which persons would be excluded. See *Final Report*, Map Insert I, foll. p. 289. Orders Nos. 1 to 99 were ratified by General DeWitt's Public Proclamation No. 7, dated June 8, 1942 (7 F. R. 4498), and Orders Nos. 100 to 108 were ratified by General DeWitt's Public Proclamation No. 14, dated August 18, 1942 (7 F. R. 6703).

[9] *Final Report*, c. X.

territory report to the Civil Control Office or Station at a given address within a specified period prior to the exclusion date; and that any person of Japanese ancestry violating the order or found in the designated territory after the exclusion date would be liable to the criminal penalties of the Act of March 21, 1942.

Each order was accompanied by Instructions stating that all persons of Japanese ancestry "will be evacuated" from the designated territory by the exclusion date; that the Civil Control Office or Station was equipped to assist the persons affected by the Order with respect to the disposition of their property; and that the United States Government would provide for the storage of specified household items at the sole risk of the owner.

The first Civilian Exclusion Order, issued on March 24, 1942, which pertained to a portion of Military Area No. 1 within the State of Washington, provided that the persons ordered excluded "may, with permission, on or prior to March 29, 1942, proceed to any approved place of their choosing beyond the limits of Military Area No. 1 and the prohibited zones established" by the Proclamations, and that such persons who had not left prior to March 30, 1942, should report to the Civil Control Office on that date "for evacuation in such manner and to such place or places as shall then be prescribed." Instructions accompanying the Order stated that evacuees who did "not go to an approved destination of their own choice" would be given "temporary residence in a reception center."

On March 27, 1942, in Public Proclamation No. 4 (7 F. R. 2601), General DeWitt terminated the previous permission to persons of Japanese ancestry to migrate from Military Area No. 1 prior to the issuance of Civilian Exclusion Orders with respect to their places of residence, and the plan of permitting them to proceed to approved destinations of their own choice after the issuance of such orders. This Proclamation prohibited persons of Japanese ancestry within Military Area No. 1 to leave that Area after March 29 except in accordance with future orders by the Commanding General.[10] Thereafter, with a few exceptions,[11] beginning on March 31 when the first group evacuation took place,[12] the evacuees from Military Area No. 1 were transported on the days their exclusion became mandatory, under military control to Assembly Centers, or in a few cases to more permanent Relocation Centers which had become available.[13] The function of the As-

[10] Migration of persons of Japanese ancestry from the California portion of Military Area No. 2 was prohibited by Public Proclamation No. 6 issued June 2, 1942 (7 F. R. 4436).

[11] The exceptions were persons in institutions, members of so-called mixed marriages and mixed-blood individuals, and persons who had previously left the evacuated area and established residences in the interior. *Final Report*, c. XII.

[12] *Fourth Interim Report*, at p. 7, cited *supra*, note 6.

[13] See "Instructions for Activities in Evacuation Projects," printed in *Fourth Interim Report* at p. 40; see *Final Report*, pp. 362–366. The program was somewhat different for Military Area No. 2; evacuees from that Area could volunteer to participate in agricultural work groups and proceed to agricultural areas as members of such groups directly from their homes without passing through Assembly Centers.

sembly Centers was set forth in "Instructions for Activities in Evacuation Projects" issued by command of General DeWitt on April 23, 1942, which stated that "pending the resettlement of such persons [of Japanese ancestry] by the War Relocation Authority, evacuees will be provided temporary shelter and other facilities at assembly centers and reception centers."

Civilian Exclusion Orders Nos. 2 to 108, including Civilian Exclusion Order No. 34 involved in this case (*infra*, pp. 88–89), omitted the provisions of Order No. 1 respecting self-arranged migration and optional shelter in reception centers. Instead they provided that "persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the [exclusion] provisions of this order while those persons are in such Assembly Center." The accompanying instructions provided that all persons of Japanese ancestry living in the specified territories would be furnished transportation to an Assembly Center or would be authorized to travel to it by private automobile in supervised groups. Failure to comply with the accompanying instructions, as well as failure to comply with the orders themselves, was made a crime under the Act of March 21, 1942.

In the evacuation to the Assembly Centers pursuant to these orders, attempts were made to insure the well-being of the evacuees. They were given physical examinations before departure, and physicians accompanied them en route. Aside from persons who were allowed to proceed in supervised convoys of private automobiles, the

evacuees were transported in buses or train coaches with four seats assigned to every three persons in order to allow sufficient room for hand baggage. Pullman berths or other special arrangements were secured for the aged or infirm.[14] Fourteen Assembly Centers were provided in all, mainly at fair grounds and race tracks, in addition to two Relocation Centers to which direct evacuation took place. At the Assembly Centers themselves, attempts were made to provide adequate housing facilities, medical services, and community activities, in order to afford as satisfactory places of detention as the hastily constructed shelters permitted. Families and, so far as possible, communities were kept together.[15] The situation was similar in the Relocation Centers to which some of the evacuees were moved without passing through Assembly Centers. Both Assembly and Relocation Centers were guarded by military police.

Provision for the detention of the evacuees in the Assembly and Relocation Centers was formalized by General DeWitt's promulgation on May 19, 1942 of Civilian Restrictive Order No. 1 (8 F. R. 982). This Order provided that all persons of Japanese ancestry who then or thereafter resided within Assembly, Reception or Relocation Centers pursuant to Exclusion Orders[16] were re-

[14] For a description of the transportation of the evacuees to the Assembly Centers, see *Final Report*, c. X, and *Fourth Interim Report*, p. 9.

[15] See *Final Report*, c. XIII to XIX.

[16] All but three of the persons evacuated under Civilian Exclusion Order No. 34 were removed to the Tanforan Assembly Center in San Mateo County. *Final Report*, p. 34. Persons of Japanese ancestry were forbidden to be in that

quired to remain unless permitted to leave in an authorization "setting forth the hour of departure and the hour of return and the terms and conditions upon which said authorization has been granted.".

B. REMOVAL FROM ASSEMBLY CENTERS

Commencing on May 20, 1942 with the issuance of Civilian Restrictive Order No. 2 (8 F. R. 982), provision was made through a series of orders for the release of evacuees from Assembly Centers in order to engage in groups in supervised agricultural work outside the evacuated areas.[17] Each order provided for the release of a specified number of evacuees to work in specified counties under arrangements to be made by the Director of the War Relocation Authority; each order also provided that the evacuees were only to proceed to the specified county and were to return to an Assembly or Relocation Center designated by the War Relocation Authority when ordered to do so by that Authority.[18] However, some of these releases were later made permanent. *Final Report,* pp.

County unless within the confines of the Tanforan Assembly Center, by Civilian Exclusion Order No. 35 (7 F. R. 3967). Hence the group evacuated under Civilian Exclusion Order No. 34 to the Tanforan Assembly Center may be considered to have been detained there under Civilian Exclusion Order No. 35, as well as under Civilian Restrictive Order No. 1.

[17] The orders are printed at 8 F. R. 982 to 986. The last of the series, Civilian Restrictive Order No. 17, was issued on September 13, 1942.

[18] These labor groups were only arranged in the event that assurance was given by the United States Employment Service or by public officials of the locality that the prospective employer had given adequate assurance that prevailing wages

364; 243–246. The Civilian Restrictive Orders issued prior to petitioner's arrest on May 30 which were applicable to the Tanforan and the Pinedale Assembly Centers, to which persons evacuated under Civilian Exclusion Order No. 34 were taken, were Civilian Restrictive Order No. 3, issued on May 23, 1942 (8 F. R. 982), which permitted the release of 1,500 persons from the Puyallup, Pinedale, Marysville, Sacramento, and Tanforan Assembly Centers for employment of the type specified above, and Civilian Restrictive Order No. 7, issued on May 28, 1942 (8 F. R. 983), which permitted the removal from any or all Assembly Centers in Military Area No. 1 of "one thousand persons of Japanese ancestry, comprising approximately two hundred and fifty families" for such employment.

Except for a relatively small number of persons, the great bulk of the evacuees who were originally confined in Assembly Centers were transferred to Relocation Centers maintained by the War Relocation Authority as these were constructed and became available. The entire transfer operation was accomplished during the period beginning May 26, 1942, and ending in November of that year.[19]

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would be paid and that the evacuees would receive adequate housing, sanitary facilities, and medical care, and only in the event that the Governor of the State or public officials in the locality gave assurance that law and order would be maintained. A total of 1,740 evacuees were temporarily released under this program. *Final Report*, pp. 243–246.

[19] *Final Report*, p. 282; First Quarterly Report of War Relocation Authority (March 18 to June 30, 1942), pp. 17–18; Second Quarterly Report of War Relocation Authority (July 1 to Sept. 30, 1942), pp. 2–3, 11–14; Third

The Relocation Centers were constructed with the objective of enabling the evacuees to "settle down to a more stable kind of life until plans could be developed for their permanent relocation in communities outside of the evacuated areas."[20] Accordingly, these centers afforded opportunity for more comfortable living than the Assembly Centers; community services were provided; partial self-government was permitted, and continuous attempts have been made to improve the equipment and conduct of these centers. Persons residing in the centers are employed in the operation of the centers and in other productive enterprises; they are paid for their work and they can with their wages purchase clothing and other incidentals which are not provided by the War Relocation Authority.[21]

On June 27, 1942, General DeWitt issued Public Proclamation No. 8, *infra*, pp. 94–97, which, reiterating the prohibition of Civilian Restrictive Order No. 1, stated that all Relocation Centers then or thereafter established within the Western

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Quarterly Report of War Relocation Authority (October 1 to December 31, 1942), pp. 1–3; Senate Document No. 96, 78th Cong., 1st Sess., *Segregation of Loyal and Disloyal Japanese in Relocation Centers*, pp. 7–8.

[20] First Quarterly Report of the War Relocation Authority (March 18 to June 30, 1942), p. 6.

[21] Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on National War Agencies Appropriation Bill, 1944, 78th Cong., 1st Sess., Part 2 (Testimony of Dillon S. Meyer, Director of the War Relocation Authority), pp. 737, 746–769; First Quarterly Report of War Relocation Authority, cited *supra*, note 19, and Semi-Annual Report of the War Relocation Authority (January 1 to June 30, 1943), *passim*.

Defense Command were designated War Relocation Project Areas,[22] and that all persons of Japanese ancestry residing in such Areas were required to remain within them unless authorized to leave by "a written authorization executed by or pursuant to the express authority of this headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted." By a letter dated August 11, 1942, General DeWitt conferred authority upon the War Relocation Authority to issue permits for evacuees to leave the Relocation Centers within the Western Defense Command.[23]

Beginning with its Administrative Instruction No. 22 of July 20, 1942, the War Relocation Authority has made increased provision for evacuees to leave the Relocation Centers in order to work or reside in communities outside the prohibited areas. As issued in developed form on September 26, 1942,[24] its regulations continue the agricultural work group program by providing for leave to engage in seasonal employment (Sec. 5.1 (b)), pro-

[22] The War Relocation Centers or Project Areas within the Western Defense Command are: Central Utah Relocation Center, Topaz, Utah; Colorado River Relocation Center, Poston, Arizona; Gila River Relocation Center, Rivers, Arizona; Manzanar Relocation Center, Manzanar, California; Minidoka Relocation Center, Hunt, Idaho; Tule Lake Relocation Center, Newell, California.

[23] Public Proclamation No. WD-1 issued by Secretary of War Stimson on August 13, 1942 (7 F. R. 6593), provides for the detention of persons of Japanese ancestry in the Relocation Centers established outside the Western Defense Command and it delegates authority to the War Relocation Authority to provide for their release.

[24] Regulations of the War Relocation Authority, 7 F. R. 7656, continued January 1, 1944, 9 F. R. 154.

vide for permits for "short term" leave of not more than 30 days (Sec. 5.1 (a)), and establish procedures for "indefinite leave" (5.1 (c)). A permit for indefinite leave places no time limit on the permittee's residence outside the Center and may provide for "travel unlimited except as to restrictions imposed by military authorities with reference to military areas or zone . . ." (Sec. 5.8 (b)). An application for "indefinite leave" is to be granted when the Director is satisfied that the applicant is willing to make required reports to the War Relocation Authority following his departure from the Center, is satisfied that the applicant will have employment or other means of support and can successfully maintain residence at his proposed destination, and is satisfied that the issuance of leave in the particular case will not interfere with the war program or otherwise endanger the public peace and security (Sec. 5.3 (e), (f)). The only reports which have been required are notifications of arrival at the proposed destination and of subsequent changes of employer or of residence (Sec. 5.5 (b)). The regulations provide that the Director may revoke any leave when conditions are so far changed or when such additional information has become available that an original application for leave would be denied (Sec. 5.9 (b)).

A leave clearance procedure [25] has also been developed, whereby the individual's personal fitness for leave from the standpoint of internal security may be determined separately from the

[25] Now embodied in the Regulations of January 1, 1944, 9 F. R. 154, Sec. 5.3 (b).

other factors to be weighed in granting a permit—often in advance of an application for the permit itself.[26]

The development and results of the War Relocation Authority's relocation and leave procedures are set forth fully in the Government's brief in *Ex parte Endo*, No. 70 at the present Term of Court. A total of 110,219 persons were evacuated, of whom 92,193 went to the Assembly Centers and 18,026 directly to Relocation Centers,[27] of whom approximately two-thirds were American citizens. In all, 108,503 entered Relocation Centers.[28] The remainder were released without having entered such Centers, under the agricultural work group program or under regulations applicable to parties to mixed marriages and to persons who could join their families in the interior.[29]

Of the 1,214 persons evacuated under Civilian Exclusion Order No. 34, 1,211 were removed to the Tanforan Assembly Center. All told, 7,928 persons were evacuated to that Center.[30] There were 8,033 who left Tanforan, including those originally admitted and those born there or transferred from other centers. Of these, 7,673 were transferred to the Central Utah Relocation Project in September and October 1942; 38 were released under the agricultural work group program; 198 were otherwise transferred to the custody of War

[26] Semi-Annual Report of War Relocation Authority (Jan. 1 to June 30, 1943) pp. 14–15.

[27] *Final Report*, pp. 84, 346.

[28] *Idem*, p. 279.

[29] *Idem*, p. 278.

[30] *Idem*, p. 363.

Relocation Authority; 21 were apprehended as dangerous alien enemies or otherwise by law enforcement agencies; 36 were released as parties to mixed marriages; 22 died; 9 were transferred to other Assembly Centers; and 36 were otherwise released.[31]

[31] *Idem*, Table 52, p. 374.

APPENDIX II

EXECUTIVE ORDER NO. 9066, DATED FEBRUARY 19, 1942, 7 F. R. 1407

AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS

WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby

authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore

granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

Act of March 21, 1942, c. 191, 56 Stat. 173 (18 U. S. C., Supp. III, 97a).

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

PUBLIC PROCLAMATION No. 1, 7 F. R. 2320

WAR DEPARTMENT

(Public Proclamation No. 1)

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California

MILITARY AREAS NOS. 1 AND 2 DESIGNATED AND ESTABLISHED

MARCH 2, 1942.

To: The people within the States of Arizona, California, Oregon, and Washington, and the Public Generally.

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine,

from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations;

Now therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as gen-

erally shown on the map attached hereto and marked Exhibit 2.

2. Military Areas Nos. 1 and 2, as particularly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A–1, lying wholly within Military Area No. 1; Zones A–2 to A–99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and Zone B, comprising all that part of Military Area No. 1 not included within Zones A–1 to A–99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A–2 to A–99, inclusive, as are within Military Area No. 2.

Certain persons or classes of persons who are by subsequent proclamation excluded from the zones last above mentioned may be permitted, under certain regulations and restrictions to be hereafter prescribed, to enter upon or remain within Zone B.

The designation of Military Area No. 2 as such does not contemplate any prohibition or regula-

tion or restriction except with respect to the zones established therein.

5. Any Japanese, German or Italian alien, or any person of Japanese Ancestry now resident in Military Area No. 1 who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within the States of Washington, Oregon, California and Arizona. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The designation of prohibited and restricted areas within the Western Defense Command by the Attorney General of the United States under the Proclamations of December 7 and 8, 1941, and the instructions, rules and regulations prescribed by him with respect to such prohibited and restricted areas, are hereby adopted and continued in full force and effect.

The duty and responsibility of the Federal Bureau of Investigation with respect to the investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DeWitt,
Lieutenant General,
U. S. Army, Commanding.

PUBLIC PROCLAMATION No. 2, 7 F. R. 2405

WAR DEPARTMENT

(Public Proclamation No. 2)

Headquarters Western Defense Command and Fourth Army Presidio of San Francisco, California

ESTABLISHMENT OF MILITARY AREAS 3, 4, 5, AND 6

MARCH 16, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any persons to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or

the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones in addition to those established in Public Proclamation No. 1, this headquarters, dated March 2, 1942.

2. Pursuant to the determination and statement of military necessity in paragraph 1 hereof, there are hereby designated and established the following Military Areas:

Military Area No. 3, embracing the entire State of Idaho.

Military Area No. 4, embracing the entire State of Montana.

Military Area No. 5, embracing the entire State of Nevada.

Military Area No. 6, embracing the entire State of Utah.

3. Within Military Areas Nos. 1 and 2 as designated and established in Public Proclamation No. 1, above mentioned, and within Military Areas Nos. 3, 4, 5 and 6, as defined herein, there are hereby established, pursuant to paragraph 1 hereof Zones A–100 to A–1033, inclusive, all as more particularly described and defined in Exhibit 1, hereto attached, and as generally shown on the maps attached hereto and marked Exhibits 2, 3, 4, 5, 6, 7, 8 and 9.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from Zones A–100 to A–1033, inclusive.

The designation of Military Areas Nos. 3, 4, 5 and 6 as such does not contemplate any prohibition, regulation or restriction except with respect to the Zones established therein, and except as provided in paragraph 5 hereof.

5. Any Japanese, German, or Italian alien, or any person of Japanese ancestry now resident in the states of the Western Defense Command, namely, Washington, Oregon, California, Montana, Idaho, Nevada, Utah, and Arizona, who changes his place of habitual residence is hereby required to obtain and execute a "Change of

Residence Notice" at any United States Post Office within any of the states mentioned. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The duty and responsibility of the Federal Bureau of Investigation with respect to the investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

PUBLIC PROCLAMATION No. 4, 7 F. R. 2601

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California.

Public Proclamation No. 4.

MARCH 27, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:

Whereas, by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there was designated and established Military Area No. 1 and

Whereas, it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration:

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare that the present situation requires as a matter of military necessity that, commencing at 12:00 midnight, P. W. T., March 29, 1942, all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct.

Any person violating this proclamation will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zones." In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment.

J. L. DeWitt,
Lieutenant General,
U. S. Army, Commanding.

CIVILIAN EXCLUSION ORDER No. 34, 7 F. R. 3967

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California.

(Civilian Exclusion Order No. 34)

Persons of Japanese Ancestry Excluded from Restricted Area—Alameda County, California

MAY 3, 1942.

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P. W. T., of Saturday, May 9, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows:

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the city of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said Highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay;

thence northerly, and following the shoreline of San Francisco Bay to the point of beginning.

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or during the same hours on Tuesday, May 5, 1942, to the Civil Control Station located at: 920 "C" Street, Hayward, California.

3. Any person subject to this order who fails to comply with any of its provisions or published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P. W. T., of Saturday, May 9, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DeWITT,
Lieutenant General, U. S. Army,
Commanding.

(Instructions Accompanying Civilian Exclusion Order No. 34)

Western Defense Command and Fourth Army
Wartime Civil Control Administration, Presidio
of San Francisco, California.

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY LIVING IN THE FOLLOWING AREA

All of that portion of the County of Alameda, State of California, within the boundary beginning at the point where the southerly limits of the City of Oakland meet San Francisco Bay; thence easterly and following the southerly limits of said city to U. S. Highway No. 50; thence southerly and easterly on said Highway No. 50 to its intersection with California State Highway No. 21; thence southerly on said Highway No. 21 to its intersection, at or near Warm Springs, with California State Highway No. 17; thence southerly on said Highway No. 17 to the Alameda-Santa Clara County line; thence westerly and following said county line to San Francisco Bay; thence northerly, and following the shoreline of San Francisco Bay to the point of beginning.

Pursuant to the provisions of Civilian Exclusion Order No. 34, this Headquarters, dated May 3, 1942, all persons of Japanese ancestry, both alien and non-alien will be evacuated from the above area by 12 o'clock noon, P. W. T., Saturday, May 9, 1942.

No Japanese person living in the above area will be permitted to change residence after 12

o'clock noon, P. W. T., Sunday, May 3, 1942, without obtaining special permission from the representative of the Commanding General, Northern California Sector, at the Civil Control Station located at:

920 "C" Street
Hayward, California.

Such permits will only be granted for the purpose of uniting members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.

2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles, and livestock.

3. Provide temporary residence elsewhere for all Japanese in family groups.

4. Transport persons and a limited amount of clothing and equipment to their new residence.

THE FOLLOWING INSTRUCTIONS MUST BE OBSERVED:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 A. M. and 5:00 P. M. on Monday, May 4, 1942, or between

8:00 A. M. and 5:00 P. M. on Tuesday, May 5, 1942.

2. Evacuees must carry with them on departure for the Assembly Center, the following property:

(a) Bedding and linens (no mattress) for each member of the family;

(b) Toilet articles for each member of the family;

(c) Extra clothing for each member of the family;

(d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;

(e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group.

3. No pets of any kind will be permitted.

4. No personal items and no household goods will be shipped to the Assembly Center.

5. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

6. Each family, and individual living alone, will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 A. M. and 5:00 P. M., Monday, May 4, 1942, or between the hours of 8:00 A. M. and 5:00 P. M., Tuesday, May 5, 1942, to receive further instructions.

J. L. DEWITT,
Lieutenant General, U. S. Army,
Commanding.

MAY 3, 1942.

See Civilian Exclusion Order No. 34.

CIVILIAN RESTRICTIVE ORDER No. 1, 8 F. R. 982

WAR DEPARTMENT.

(Civilian Restrictive Order 1)

Persons of Japanese Ancestry—Procedure for Departure From Assembly Centers, Etc.

MAY 19, 1942.

Headquarters Western Defense Command and Fourth Army, Office of the Commanding General, Presidio of San Francisco, California.

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this headquarters, dated March 2, 1942, and March 16, 1942, respectively: *It is hereby ordered,* That all persons of Japanese ancestry, both alien and nonalien who now, or shall hereafter reside, pursuant to exclusion orders and instructions from this headquarters, within

the bounds of established assembly centers, reception centers or relocation centers, as such bounds are designated on the ground by boundary signs in each case, shall during the period of such residence be subject to the following regulations:

(a) All such persons are required to remain within the bounds of assembly centers, reception centers or relocation centers at all times unless specifically authorized to leave as set forth in paragraph (b) hereof.

(b) Any such person, before leaving any of these centers, must first obtain a written authorization executed by or pursuant to the express authority of this headquarters setting forth the hour of departure and the hour of return and the terms and conditions upon which said authorization has been granted.

2. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto will be liable to the penalties and liabilities provided by law.

J. L. DEWITT,
Lieutenant General, U. S. Army,
Commanding.

PUBLIC PROCLAMATION No. 8, 7 F. R. 8346

Headquarters Western Defense Command and Fourth Army, Presidio of San Francisco, California

PUBLIC PROCLAMATION NO. 8

JUNE 27, 1942.

To: The people within the States of Washington, Oregon, California, Montana, Idaho, Nevada,

Utah and Arizona, and the Public Generally.

Whereas by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2, and by Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5 and 6, and

Whereas the present situation within these military areas requires as a matter of military necessity that persons of Japanese ancestry who have been evacuated from certain regions within Military Areas Nos. 1 and 2 shall be removed to Relocation Centers for their relocation, maintenance and supervision and that such Relocation Centers be designated as War Relocation Project Areas and that appropriate restrictions with respect to the rights of all such persons of Japanese ancestry, both alien and non-alien, so evacuated to such Relocation Centers and of all other persons to enter, remain in, or leave such areas be promulgated;

Now, Therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

a. Pursuant to the determination of military necessity hereinbefore set out, all the territory included within the exterior boundaries of each Relocation Center now or hereafter established

within the Western Defense Command, as such boundaries are designated and defined by orders subsequently issued by this headquarters, are hereby designated and established as War Relocation Project Areas.

b. All persons of Japanese ancestry, both alien and nonalien, who now or shall hereafter be or reside, pursuant to exclusion orders and instructions from this headquarters, or otherwise, within the bounds of any established War Relocation Project Area are required to remain within the bounds of such War Relocation Project Area at all times unless specifically authorized to leave as set forth in Paragraph c hereof.

c. Any person of Japanese ancestry, both alien and nonalien, who shall now or hereafter so be or reside within any such War Relocation Project Area, shall, before leaving said Area, obtain a written authorization executed by or pursuant to the express authority of this headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted.

d. No persons other than the persons of Japanese ancestry described in Paragraph b hereof, and other than persons employed by the War Relocation Authority established by Executive Order No. 9102, dated March 18, 1942, shall enter any such War Relocation Project Area except upon written authorization executed by or pursuant to the express authority of this headquarters first obtained, which said authorization shall set forth the effective period thereof and the

terms and conditions upon and purposes for which it has been granted.

e. Failure of persons subject to the provisions of this Public Proclamation No. 8 to conform to the terms and provisions thereof shall subject such persons to the penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing any Act in Military Areas or Zones."

J. L. DEWITT,
Lieutenant General,
U. S. Army, Commanding.

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. [redacted] 22

FRED TOYOSABURO KOREMATSU,

Appellant;

against

UNITED STATES OF AMERICA,

Appellee.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

MORRIS M. GRUPP,
CLARENCE E. RUST,
of the California Bar.

EDWIN BORCHARD,
of the Connecticut Bar.

OSMOND K. FRAENKEL,
ARTHUR GARFIELD HAYS,
of the New York Bar.

HAROLD EVANS,
WILLIAM DRAPER LEWIS,
THOMAS RAEBURN WHITE,
of the Pennsylvania Bar,

of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. .....

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Appellant,

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UNITED STATES OF AMERICA,
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ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

The American Civil Liberties Union joins with petitioner in asking this Court to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming petitioner's conviction, because the American Civil Liberties Union believes that it is important that this Court mark out precisely the boundaries of military power over civilians. The American Civil Liberties Union is particularly interested in this case because it presents problems of detention of citizens without judicial process, of discrimination on account of race and of summary action without hearing. By reason of its concern with these issues the Union had filed a brief amicus curiae with this Court in

the cases of *Hirabayashi* v. *United States* (320 U. S. 81) and *Yasui* v. *United States* (320 U. S. 115) when these were argued at the end of the October 1942 Term. However, this Court, in upholding the *Hirabayashi* conviction, did not pass upon the issue which to the Union seemed of the greatest importance in that case, namely, the validity of the order requiring all persons of Japanese ancestry, citizens and aliens alike, to depart from their homes on the west coast and be confined to camps. That issue is now clearly present in the case at bar.

The Circuit Court concluded that the reasons which formed the basis of the Court's decision in the *Hirabayashi* case sustained the validity of the evacuation order, as well as the curfew restrictions. Judge Denman, while concurring that the questioned order was valid, disagreed from the conclusion of his colleagues that the issues had already been in effect disposed of by this Court. Sharing that view, we respectfully request the Court to grant a review in this case, so that it can expressly pass upon the important issues left open for determination in the *Hirabayashi* case.

There are three primary questions which concern the American Civil Liberties Union in its desire to protect all persons in their constitutional rights. Can citizens be detained by administrative order? Can evacuation and detention of citizens be justified simply on the ground that they are descended from persons whose fellow nationals are enemy aliens? Can evacuation and detention of citizens be carried out by military authority without any provision for inquiry whereby a particular individual can establish that he does not come within the general ground for the contemplated action?

POINT I

The military authorities have no power to order the detention of citizens.

We believe that this case presents the question of the power of the military to detain citizens against whom no charges have been preferred. We contend that no such power has been granted by Congress, or could constitutionally be granted.

The issue is presented because the evacuation orders, taken as a whole, made it quite plain that not evacuation only was required, but indefinite detention as well. That was conceded in the opinion of Judge Denman in the Circuit Court. And the facts permit of no other conclusion. On March 18, 1942 the President (Order 9102) established the War Relocation Authority to take charge of the "relocation, maintenance and supervision" of those about to be removed by the military authorities. On March 27, 1942 General deWitt issued Proclamation No. 4 (7 F. R. 2601), which forbade persons of Japanese ancestry from leaving the previously designated Military Area without express permission. This was followed by a series of exclusion orders, and the establishment of "Assembly Centers" and "Relocation Centers", to which all evacuees were sent. By the time the exclusion order here in question (No. 34) was promulgated (May 3, 1942), this practice had become uniform. Indeed the instructions which accompanied the order made it evident that the evacuees were to be transported to such centers. Moreover, no one was permitted to leave a center without express permission, and the only permission then contemplated was for limited periods of time (see Civilian Restrictive Order No. 1, May 19, 1942, 8 F. R. 982). That the evacuation and detention were part of a single integrated program is made clear in the recently published report by the War Department. This report, entitled "Japanese Evacuation from the West Coast,

1942", deals at length with the entire subject. Particularly pertinent in this connection are pages 44 ff., 78, 94, 237 ff. and the typical form of instructions printed at page 99.

We submit that Congress gave neither to the President nor to military authorities any power so far reaching, and that in the absence of legislation the President has no such power even in time of war. Public law No. 503 certainly is not capable of being construed as authority to detain citizens. And this Court's decision in the *Hirabayashi* case does not so hold; for it dealt only with curfew orders which were explicitly referred to at the time the law was under consideration. It is not enough to conclude that evacuation, which was also under contemplation, and was expressly referred to in the law, was authorized. For here there was not merely evacuation, but evacuation as a step toward detention.

Some attempt was made by the government, in the *Hirabayashi* case, to argue that the action taken was ratified by Congressional appropriation for the War Relocation Authority. But this appropriation was not voted until July 25, 1942 (56 Stat. 704). It could not ratify administrative orders made in May so as to make their violation then a crime. Petitioner was prosecuted by information filed June 12, 1942 for an offense alleged to have been committed in May. If the regulation he was charged with then violating was then not authorized by Congress no later ratification could make his disobedience in May a crime. That would be a violation of the prohibition against ex post facto laws (Art. I § 9). *See United States v. Stafoff*, 260 U. S. 477; *Viereck v. United States*, 318 U. S. 236.

We submit also that the war power of the President alone would not support such an order. This Court in effect so ruled in *Brown v. United States*, 8 Cranch. 110. That case dealt with a Presidential attempt to seize British owned property during the war of 1812. Chief Justice Marshall ruled that since Congress had given the President the right to detain enemy aliens but not the right to seize their property, his act was without support in the law.

follows by like reasoning that since Congress has given the President power to detain enemy aliens (50 U. S. C. A. 21) but has not given the President similar power to detain citizens the order here under review cannot be sustained on the President's war power alone.

Writers on the subject have reached the same conclusion. Thus in Berdahl, War Powers of the Executive in the United States, it is nowhere suggested that these powers extend to the removal of citizens from one part of the United States to the other. It is only when martial law has been declared that executive authority may be exercised over citizens. Of course, there was no martial law in California. In Chapter 11 pages 183 and following, Mr. Berdahl discusses the President's power of police control and recognizes that such power over persons is derived only from Congressional authorization. The most that he concedes is that when Congress is not in session, the President may have power to act in an emergency (p. 192). Here Congress was continuously in session.

Finally, we submit that even the President and Congress, acting together, may not detain citizens of the United States against whom no charges have been preferred. The framers of the Constitution recognized the propensity of governments in times of crisis to take executive action rather than to pursue the ordinary course of the criminal law. The framers realized that in certain situations such conduct was necessary to the maintenance of government. For that reason the framers permitted the suspension of the writ of habeas corpus by which unlawful executive detention was normally challenged, but permitted such suspension only in time of invasion or insurrection. They did not permit the suspension merely because of the existence of a state of war, or even because of a fear of invasion. It was evidently contemplated that the detention permissible as the result of the suspension of the writ of habeas corpus should be possible only at a time of the direst immediate emergency, not at all as a precautionary measure. If, as we

think must be conceded, the situation in California in May, 1942 would not have warranted the suspension of the writ of habeas corpus, then it must follow that any legislation seeking to circumvent the prohibition against the suspension of habeas corpus would be void. And any legislation directly authorizing the detention of citizens, except as the result of charges preferred under the criminal laws, would be an attempt to evade the prohibition against the suspension of the writ.

We do not believe that Congress intended to evade such suspension. That is one of the reasons why we do not think that the Act of March 21, 1942 can be construed as authorizing the detention of American citizens.

The questions raised are clearly important and far reaching. They have never heretofore been passed upon by this Court. Surely, review should be granted.

POINT II

The classification of citizens based solely on ancestry is a denial of due process and is forbidden by the Fifth Amendment.

We recognize, of course, that the Federal Government, unlike the states, is not subject to any express limitation in the selection of subjects or persons to be dealt with by government action; in other words, that the Constitution contains no equal protection clause affecting the Federal Government. Nevertheless, the due process clause of the Fifth Amendment does limit the power of the Federal Government in respect to classification. (See *Detroit Bank v. United States*, 317 U. S. 329, 337, and cases cited.) In the *Hirabayashi* case this Court recognized that classification on racial grounds is ordinarily arbitrary. But the Chief Justice concluded that the fact of racial ancestry was relevant so as to justify the imposition of a curfew order on citizens of Japanese origin only. But he was careful to point out that the Court did no more

than determine that the circumstances afforded a reasonable basis for the action taken in imposing a curfew:

> "We decide only that the curfew order, as applied, at the time it was applied, was within the boundaries of the war power."

And Mr. Justice Murphy, specially concurring, said that the decision then being rendered went "to the very brink of constitutional power."

We do not believe that the considerations which led this Court to uphold discrimination in the application of a curfew order are applicable to the order that is here in question. There are important differences in the character of the action taken and in the time when it was taken. The curfew order was imposed on March 24, 1942, to be effective within three days. It covered not only citizens of Japanese ancestry, but all enemy aliens, Japanese, German and Italian alike. It had an obvious immediate relation to the prevention of sabotage, and perhaps also to the possibility of invasion. It operated only as a minor restraint of liberty during the hours of darkness, when it was reasonable to suppose that attempts at sabotage would be most likely and assistance to a possible invader could most easily be given.

Altogether different are the various evacuation orders, one of which is here involved. These were issued over a considerable period of time, thus indicating the absence of any acute emergency calling for instant action. Indeed, the particular order here in question, Exclusion Order No. 34, was not issued until May 3, 1942, to become effective May 9, 1942. Consider, moreover, the character of this and similar orders. In the first place, they were directed only against persons of Japanese ancestry, not against enemy aliens of different origin. They were not limited to preventing the persons affected from entering military establishments, or even places which the military might consider necessary for defense purposes. Instead, they directed removal of all persons of Japanese ancestry from

their homes and places of business throughout the entire Pacific Coast area, for a depth in places of two hundred miles. (See opinion of Denman, J.) Moreover, these orders prevented persons affected from voluntarily leaving the areas and required them to submit to forced assembly in camps and to ultimate detention, at the pleasure of the military authorities.

We do not believe that the same circumstance of "ethnic affiliations with an invading enemy"—to quote a portion of the Chief Justice's opinion, which we cannot but feel was unfortunately phrased—can form the basis for the discrimination here practiced.

Whereas the curfew order was imposed on all enemy aliens, this order was restricted only to the Japanese. Whatever the justification for including citizens of Japanese ancestry as well as aliens within the scope of the curfew order, there can be no justification for providing for the wholesale evacuation from their homes and places of business of citizens of Japanese ancestry, while leaving even enemy aliens of German and Italian origin completely unaffected.

No considerations of relevancy can justify that result. Certainly, the action cannot be justified as a measure of protection against sabotage, for the danger of sabotage was a country-wide danger. It was in no way restricted to the Pacific Coast. And it was a danger even more to be feared from persons of German or Italian extraction, because of the greater likelihood of access on their part to places where sabotage might be fruitful. The very strangeness of appearance of persons of Japanese ancestry rendered the possibility of sabotage on their part less likely. Nor can fear of invasion be asserted as justification. It is true that at the time that the exclusion orders were first promulgated, the Japanese were proceeding without check in their conquest of the Philippines and the Dutch East Indies. Nevertheless, it must have been evident by the time the order in question was promulgated that no immediate invasion was possible. The Japanese had not

then invaded Australia; they had not even attacked Hawaii a second time. That the military authorities might have required all persons of Japanese ancestry to register and perhaps to report their continued whereabouts, so that appropriate action might be taken in case of possible invasion, is one thing. To assert that the mere possibility of invasion justifies what was done here is another. We do not believe that the necessity for a successful prosecution of the war, even the necessity for giving wide discretion to military authority, should permit such cruel and arbitrary interference with the freedom and livelihood of American citizens, as was here accomplished. Surely, the question is of such fundamental and far-reaching importance as to justify review by this Court.

POINT III

The exclusion order constituted a denial of due process because it made no provision for any hearing.

This point was also urged upon the Court in the *Hirabayashi* case. It was there rejected, insofar as the curfew order was concerned. The majority opinion contained no explicit discussion of this phase of the case. However, Mr. Justice Douglas, concurring, expressed the view that:

> "Where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient."

Again there is a difference between the scope and circumstances of the curfew order and those of the exclusion orders. The basis of the curfew order was obviously to minimize the possibility of harm which might result during the hours of darkness. It had but a limited effect on the liberties of the individuals restricted. It could be lifted when the emergency passed without the imposition of any serious harm on anyone. One's concept of fairness is not

shocked by the requirement that all persons in a certain group obey such an order, even though no opportunity is afforded to individuals to establish that because of their loyalty and devotion to this country, there was no reason for the government to fear harm should they be allowed to move about at night.

Quite different is the situation which resulted from the evacuation order. Under this and similar orders nearly one hundred thousand American-born men, women and children were torn from their accustomed ways of life and forced into concentration camps. Here is no temporary partial restraint of liberty, which, when lifted, has done no substantial harm. The harm done to these people is not only substantial, but in many cases irrevocable. Property rights have been lost, business connections destroyed. The intangible things which go to make a decent way of life have been broken. And all this without the establishment of any method whereby individuals whose lives always had been without blame or suspicion could establish their right to remain where they had always lived.

It is no answer to say that hearings would have taken time. There is no reason to suppose that hearings would have been more difficult to arrange for persons of Japanese ancestry than proved to be the case for enemy aliens, both German and Italian. It would not have been necessary for the military authorities to have provided for some form of hearing prior to the time when they believed it necessary to evacuate the affected persons. Surely, no consideration of military necessity could have stood in the way of arrangements for providing hearings to those affected immediately upon their reporting to the assembly centers designated in the various evacuation orders. Ultimately this was, of course, done, so that large numbers of those detained have been released. Our contention, however, is that no deprivation of liberty such as was here undertaken can be justified, unless some provision is at the time made for hearings. The absence of such provision renders the original order wholly void. It cannot be saved by the

creation of hearings machinery long afterward. Particularly is that so, since at the time when it is charged that petitioner violated the military order, namely, between May 9th and May 30th, 1942, no machinery of any kind existed under which hearings could be held. It was not until September 26, 1942 that regulations were issued with regard to granting leaves from the camps (7 F. R. 7656).

We urge this Court, therefore, to grant certiorari so that this important question of constitutional right can be adjudicated.

POINT IV

The constitutional issues can be raised in defense to a prosecution for refusing to obey the questioned order.

This Court has recently held, in *Falbo v. United States*, 321 U. S. , that a draftee could not set up the invalidity of a draft order in defense to a prosecution for refusing to appear for induction. We do not believe the case applies to the situation here presented. In the *Falbo* case there was no attack on the constitutionality of the draft law. Here the defense is predicated mainly on the unconstitutionality of all the actions which resulted in the challenged order. In the *Falbo* case this Court rested its decision largely on the fact that the administrative process was not complete with the induction order, since the army might reject a registrant after induction. Here no machinery existed for the relief of those ordered evacuated at the time the challenged order was issued. This circumstance makes inapplicable the contents of Mr. Justice Douglas in the *Hirabayashi* case (320 U. S. 81, 108) to the effect that a person affected by military order should submit to it and then take advantage of administrative regulations to be relieved of the duty of compliance. But in May, 1942, when petitioner was charged with violation of the order, there were no administrative regulations either for hearings or for release on any terms.

We call the Court's attention to *Arver v. United States*, 245 U. S. 365. There this Court considered at length various constitutional objections to the 1917 draft law which had been urged as defenses to a prosecution for refusing to appear for induction. It occurred to no one to suggest that these defenses could be raised only by submitting to induction. Surely it can make no difference that the attack there was on an Act of Congress, while here it is on a military order.

We submit, therefore, that petitioner's challenge to the constitutionality of the questioned order was proper in this case. Any other conclusion would be destructive of liberty.

CONCLUSION

Since important questions of constitutional right are presented in this case, questions not heretofore decided by this Court, certiorari should be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

MORRIS M. GRUGE,
CLARENCE E. RUSE,
of the California Bar,

EDWIN BOISCHARD,
of the Connecticut Bar,

OSMOND K. FRAENKEL,
ARTHUR GARFIELD HAYS,
of the New York Bar,

HAROLD EVANS,
WILLIAM DRAPER LEWIS,
THOMAS RAEBURN WHITE,
of the Pennsylvania Bar,

Of Counsel.

In the Supreme Court

OF THE

United States

OCT 7

CHARLES

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF THE STATES OF CALIFORNIA, OREGON, AND WASHINGTON AS AMICI CURIAE, ON BEHALF OF APPELLEE.

ROBERT W. KENNY,
Attorney General of the State of California,
600 State Building, San Francisco, California,

GEORGE NEUNER,
Attorney General of the State of Oregon,
Salem, Oregon,

SMITH TROY,
Attorney General of the State of Washington,

FRED E. LEWIS,
Acting Attorney General of the State of Washington,
Olympia, Washington.

Attorneys for said States as Amici Curiae.

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In the Supreme Court

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OCTOBER TERM, 1944

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BRIEF OF THE STATES OF CALIFORNIA, OREGON, AND WASHINGTON AS AMICI CURIAE, ON BEHALF OF APPELLEE.

The States of California, Oregon, and Washington, file this brief as *amici curiae,* on behalf of appellee, by permission of this court.

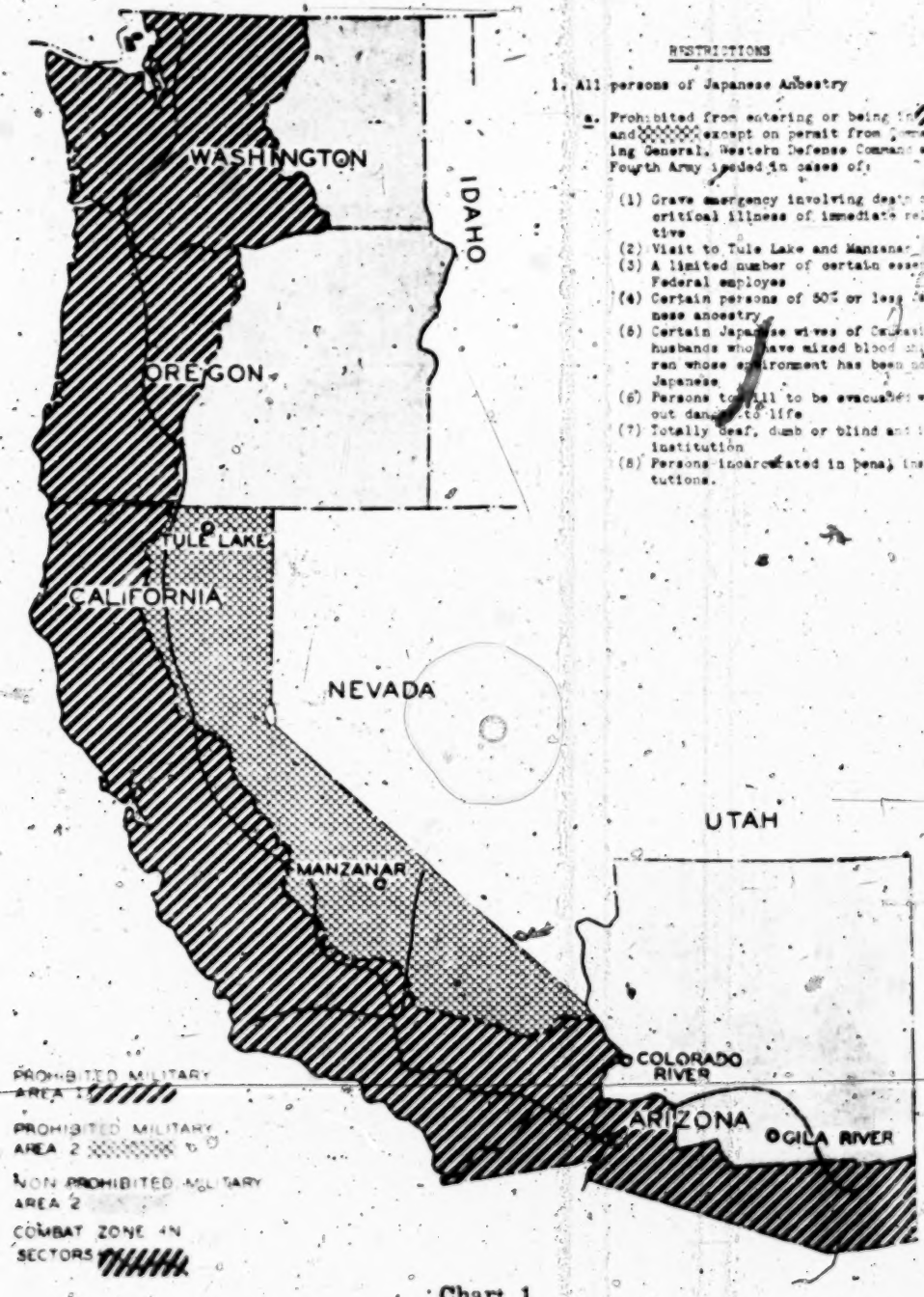
INTEREST OF THE STATES OF WASHINGTON, OREGON, AND CALIFORNIA.

At the time of the issuance of Public Proclamations Nos. 1 and 2 by the Commanding General, Western

Defense Command and the civilian exclusion orders thereunder, by which all persons of Japanese ancestry were evacuated from Military Area No. 1 and a portion of Military Area No. 2, the States of California, Oregon, and Washington, were faced with the danger of an invasion in force at some point along the coast-lines. Bombing raids and attacks from the sea were imminent. Military Area No. 1 included the Western portions of the three states and Area No. 2, the Eastern portions. One thousand miles of the coastline of Area No. 1 had to be guarded not only against attack by sea, land, and air, but also against infiltration by enemy agents. The ports of embarkation through which flowed the supply of men and materials to the Pacific battlefronts, the aircraft factories, shipyards, other war plants, and numerous military and naval establishments located in Military Area Nos. 1 and 2 made these areas particularly sensitive to sabotage and espionage. From a tactical military standpoint, the Western Defense Command was a Theater of Operations, the area encompassed within Military Area No. 1 a "Combat Zone" and Military Area No. 2, immediately adjacent to Military Area No. 1, was part of the vital zone of communication of the said Command. Concentrated within the Washington, Oregon, and California portions of Military Area Nos. 1 and 2 were 88.5% of the persons of Japanese ancestry resident in the United States. A large majority were located in the vicinity of ports of embarkation, prospective landing beaches, vital war plants, and lines of communication. The ethnic, educational, economic, political, language, and family ties

MILITARY AREAS NOS 1 AND 2

WESTERN DEFENSE COMMAND



RESTRICTIONS

1. All persons of Japanese Ancestry

a. Prohibited from entering or being in [redacted] and [redacted] except on permit from [redacted] ing General, Western Defense Command and Fourth Army [redacted] in cases of:

(1) Grave emergency involving death or critical illness of immediate relative
(2) Visit to Tule Lake and Manzanar [redacted]
(3) A limited number of certain essential Federal employes
(4) Certain persons of 50% or less Japanese ancestry
(5) Certain Japanese wives of Caucasian husbands who have mixed blood children whose environment has been non-Japanese
(6) Persons too ill to be evacuated without danger to life
(7) Totally deaf, dumb or blind and in an institution
(8) Persons incarcerated in penal institutions.

Chart 1.

of this group, with the enemy Japan, caused the military commander, Lt. Gen. J. L. DeWitt, to conclude that in order to remove the large number of potentially disloyal but unidentified Japanese from the strategic Pacific Coast area it would be necessary to evacuate as a group all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2. (Chart 1, opposite.)

Both the time required to examine this large group and the lack of an adequate test of loyalty and trained personnel, made treatment upon an individual basis impossible in the face of the emergency which required prompt action. The appellant, however, claims that the evacuation was the result of pressure brought by exclusion agitation groups and Japanese baiters, claimed to have been long active within Pacific Coast states. It is charged that the Commanding General was guilty of an abuse of his discretion and bad faith in that he acted to satisfy political and economic groups and not as a matter of military necessity. This charge was partly dissipated when this court held in *Hirabayashi v. United States* (320 U. S. 81 (1943)), that the curfew order which this Commanding General directed to all persons of Japanese ancestry, within the sensitive military areas, was issued for reasons of military necessity. As Mr. Justice Murphy stated in his concurring opinion,

> "It is not to be doubted that the action taken by the military commander in pursuance of the authority conferred upon him was taken in complete good faith and in the firm conviction that it was required by considerations of public safety and

Amici curiae are aware of the tremendous problem which would have faced the civil authorities within their states if they had been called upon to act with reference to the threat of espionage and sabotage presented by the fact that there were hidden, within this group, citizens in considerable numbers who were potentially disloyal. Now that the evacuation order is before this court, the States of California, Oregon, and Washington, believe that the facts surrounding the action taken to safeguard the national security and to protect the lives and property of the people of these states also provided a rational basis for the military decision that, because the peril was great and the time short, temporary treatment on a group basis was the only reasonable method of removing the disloyal but unidentified persons of Japanese ancestry resident within the critical military areas of these states.

STATEMENT.

In *Hirabayashi v. United States* (320 U. S. 81 (1943)) the second count of the indictment pertained to the curfew imposed upon all persons of Japanese ancestry, while the first count involved the question of the constitutionality of the civilian exclusion orders excluding such persons from Military Area No. 1 and the California portion of Area No. 2. This court, however, following an established practice of deciding only those questions which must be passed upon to sustain a sentence of conviction, stated that because sentences of the same length on

both counts were to run concurrently, there was no occasion to consider the validity of the conviction on the first count involving the constitutionality of the exclusion order. Now the instant case involving as it does the validity of a judgment of conviction under Public Law 503 (Act of March 21, 1942, 56 Stat. 173) for the violation of an exclusion order[1] necessarily brings that question before this court.[2] Most of the facts which were presented in the *Hirabayshi* case[3] as affording a rational basis for the action of the military authoritigs in ordering not only curfew, but evacuation of persons of Japanese ancestry were given judicial notice by this court in its decision in *Hirabayashi v. United States,* supra. Likewise, the principles to be applied here were mostly settled in that case. (*Korematsu v. U. S.*, 140 Fed. (2d) 289, 290 (1943).)

THE PRINCIPLES ESTABLISHED BY THE HIRABAYASHI CASE.

In the *Hirabayashi* case, the court upheld the validity of the curfew order directed to all persons of Japanese ancestry, resident within Military Area No. 1 and certain zones of other areas within the Western Defense Command, established by the Commanding

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[1]Korematsu disobeyed the particular order which applied to him on May 30, 1942, and Hirabayashi refused to obey his order on May 11 and 12, 1942.

[2]It is assumed that all the relevant facts upon this appeal will be stated in Government's brief.

[3]See brief of these *amici curiae* in the *Hirabayashi* case, No. 870, Oct. Term 1942.

General, Western Defense Command. The establishment of these areas by Public Proclamations Nos. 1 and 2 (7 Fed. Reg. 2320, 2405) issued pursuant to Presidential Executive Order No. 9066 (7 Fed. Reg. 1407) and under ratification of Congress (Public Law No. 503, Act of March 21, 1942) were approved by this court. It was also there decided that the President and Congress, acting jointly in the exercise of their war powers, could authorize a designated military commander to imposed curfew upon persons within the military areas and that the facts pertaining to the military situation and American-Japanese within Military Area Nos. 1 and 2 at the time and place afforded a reasonable basis for the military commander's action taken pursuant to the Presidential and Congressional authorization in imposing curfew upon all persons of Japanese ancestry within the prescribed area and zone.

In making this decision, the court recognized the following legal concepts which are common to that case and the instant case, and which should guide the decision now to be made:

(1) The President and Congress acting jointly in the exercise of the war power could grant a designated military commander the authority to impose reasonable restrictions upon citizens within military areas.

(2) Under the war power a military commander duly authorized has a wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened danger and in the selection of the means for resisting it.

(3) The extent of judicial review is to determine if there was a rational basis for the decision of the military commander—but this decision made in meeting the danger need not necessarily be the one which the court would make.

(4) The reasonableness of the action is to be judged in the light of the circumstances as they appeared to the military commander at the time.

(5) The issuance of Presidential Executive Order No. 9066 and the enactment of Public Law 503 did not constitute an unconstitutional delegation of Presidential or Congressional war power because a standard was provided and approved for the action to be taken by the military commander, namely, that orders were to be appropriate for "protection against espionage and sabotage" to national defense materials, premises and utilities.

(6) In creating the military areas and stating the type of measures to be prescribed therein, Public Proclamations Nos. 1 and 2 issued by the Commanding General, Western Defense Command, pursuant to Executive Order No. 9066, conformed to the stated standards and were otherwise valid.

(7) Congress through the enactment of Public Law 503 ratified Executive Order No. 9066 and Public Proclamations Nos. 1 and 2.

(8) Public Law 503, a criminal statute, is to be read in the light of the fact that Congress at the time of enactment had before it the Executive Order and Public Proclamations Nos. 1 and 2, which contained

adequate standards and findings. It was, therefore, not void for uncertainty.

(9) Although in most circumstances racial distinctions are irrelevant, the facts and circumstances pertaining to the Japanese population of the Pacific Coast when considered in the light of a threatened attack by Japan and the danger of espionage and sabotage afforded a reasonable basis for dealing with all persons of Japanese ancestry in the area as a group. Restrictions placed upon this group, if reasonable in the light of these dangers, would not constitute an unlawful discrimination in violation of the "due process" requirements of the Fifth Amendment.

(10) In time of war a person may be tried and convicted under Public Law 503 for violating an order of an appropriate military commander made applicable to citizens within a military area provided that the said order is based upon findings of the commander which conform to the standards approved by the President and Congress, and provided further that the measure appears at the time to be reasonably necessary for carrying out the Presidential and Congressional authority.

QUESTIONS PRESENTED.

With these above stated facts and principles recognized by this court there are but three questions presented here:

(1) Did the President authorize and did Congress ratify the exclusion of persons from military areas

with particular reference to persons of Japanese ancestry within military areas of the Pacific Coast?

(2) Was the exclusion of persons of Japanese ancestry from Pacific Coast military areas within the bounds of the war powers of the President and Congress?

(3) At the time and place did a rational basis exist for the decision of the Commanding General, Western Defense Command, to exclude as a group, first on a voluntary and then on a controlled basis, all persons of Japanese ancestry from certain Pacific Coast military areas?

SUMMARY OF ARGUMENT.

(1) The court in *Hirabayashi v. U. S.* (320 U. S. 81) (1943) upheld the power of the President and Congress in time of war to authorize the military commander of the Western Defense Command to issue Public Proclamations Nos. 1 and 2, and of Congress to provide through the enactment of Public Law 503 (Act of March 21, 1942) criminal sanctions for the violation of orders issued pursuant to this authorization.

(2) The President authorized and Congress ratified the exclusion of all persons of Japanese ancestry from those military areas indicated by the said proclamations.

(3) The exclusion of persons from military areas is within the war powers of the President and Congress.

(4) The scope of the judicial review is to determine if in the light of all the relevant circumstances there was a rational basis for the exclusion orders directed to all persons of Japanese ancestry.

(5) At the time of the issuance of the exclusion orders, there was a rational basis for the military decision to evacuate as a group all persons of Japanese ancestry.

ARGUMENT.

I.

THE PRESIDENT AUTHORIZED AND CONGRESS RATIFIED THE EXCLUSION OF PERSONS FROM PACIFIC COAST MILITARY AREAS WITH PARTICULAR REFERENCE TO PERSONS OF JAPANESE ANCESTRY.

That the President by Executive Order No. 9066 and Congress, by the enactment of Public Law 503 (Act of March 21, 1942), authorized the exclusion of persons of Japanese ancestry is even clearer than the authorization given for the imposition of curfew upon members of this group.

Executive Order No. 9066 authorized a designated military commander to establish military areas in such place and of such extent as he might determine "*from which any or all persons may be excluded,* and with respect to which, the *right of any persons to enter, remain in or leave* shall be subject to *whatever restrictions* the Secretary of War or the appropriate military commander may impose in his discretion". (7 Fed. Reg. 1407.)

Proclamations Nos. 1 and 2 (7 Fed. Reg. 2320, 2405), issued pursuant to the Executive Order, expressly stated that "such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from Military Area No. 1" and also from certain zones of Military Area No. 2.

As this court has pointed out, the Executive Order and these Proclamations were before Congress when it enacted Public Law 503 for the purpose of providing sanctions for the enforcement of orders issued under the authority of the Executive Order. The opinion further emphasizes that the legislative history shows particularly that the exclusion from prescribed military areas of all persons of Japanese ancestry, citizens as well as aliens, was one of the clearly stated objectives of the statute[4] and that evacuation of this group was thus clearly ratified by the Congress.

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[4] "The Chairman of the Senate Military Affairs Committee explained on the floor of the Senate that the purpose of the proposed legislation was to provide means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066. He read General DeWitt's Public Proclamation No. 1, and statements from newspaper reports that '*evacuation of the first Japanese aliens and American-born Japanese*' was about to begin. He also stated to the Senate that 'reasons for suspected widespread fifth-column activity among Japanese' were to be found in the system of dual citizenship which Japan deemed applicable to American-born Japanese, and in the propaganda disseminated by Japanese consuls, Buddhist priests and other leaders, among American-born children of Japanese. *Such was stated to be the explanation of the contemplated evacuation from the Pacific Coast area of persons of Japanese ancestry, citizens as well as aliens.* 88 Cong. Rec. 2722-26; see also pp. 2729-2730. Congress also had before it the Preliminary Report of a House Committee investigating national defense migration of March 19, 1942, which approved the provisions of Executive Order No. 9066, and which recommended the evacuation, from military areas established under

II.

THE EXCLUSION OF PERSONS FROM MILITARY AREAS WAS WITHIN THE COMBINED WAR POWERS OF THE PRESIDENT AND CONGRESS.

The exclusion of persons from critical areas in time of war, when required by military necessity, is within the scope of the joint war powers of Congress and the President.

The war power, which the court has found was jointly exercised by the President and Congress through the issuance of Executive Order 9066 and the enactment of Public Law 503, will permit in time of war and when military necessity requires, the evacuation from critical military areas of persons deemed to be potentially dangerous to the national security.

As this court said in the *Hirabayashi* case:

> "The war power of the National Government * * * extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war

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the Order, of all persons of Japanese ancestry, including citizens. H.R. Rep. No. 1911, 77th Cong., 2d Sess." (p. 91.)

The Hirabayashi opinion refers to the letters which the Secretary of War wrote to the Chairman of the Senate Committee on Military Affairs and to the Speaker of the House. The Secretary stated that the purpose of Public Law 503 was to provide enforcement for Presidential Executive Order No. 9066, which authorized the *exclusion of all persons* from prescribed military areas "for purposes of national defense". 88 Cong. Rec. 2722; H.R. Rep. No. 1906, 77 Cong., 2d Sess.; S. Rep. No. 1171, 77 Cong., 2d Sess. (pp. 89-90.)

Emphasis throughout this brief is ours unless otherwise indicated.

materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. * * * Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Ex parte Quirin, supra (317 U. S. 1), 28-29 (ante 12, 13, 65 S. Ct. 2); cf. Prize Cases (2 Black (U.S.) 670, 17 L. ed. 477); Martin v. Mott, 12 Wheat. (U.S.) 19, 29, 6 L. ed. 537, 540. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making; it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." (p. 93.)

Exclusion undertaken in times of dire emergency is a preventive measure only and does not involve the adjudgment of a penalty for a crime without a trial—a point consistently overlooked by those challenging the exclusion orders. Such preventive action is taken, as this court said in *Moyer v. Peabody* (212 U. S. 78, 85) (when speaking of temporary detention to put down insurrection) "by way of precaution to prevent the exercise of hostile power" and "to prevent apprehended harm".

The Ninth Circuit Court, in the instant case, *Korematsu v. U. S.* (140 Fed. (2d) 289 (1943)), directly held that the power to exclude all persons of Japanese ancestry existed and, as delegated, was properly exercised. It found its authority in the principle laid down by this court in the Hirabayashi decision.

> "However, the Supreme Court held that under the Constitution the Government of the United States, in prosecuting a war, has power to do all that is necessary to the successful prosecution of a war although the exercise of those powers temporarily infringe some of the inherent rights and liberties of individual citizens which are recognized and guaranteed by the Constitution. We are of the opinion that this principle, thus decided, so clearly sustains the validity of the proclamation for evacuation, which is here involved, that it is not necessary to labor the point." (p. 290.)

The individual rights which were affected by the evacuation are of the highest order, but these rights, precious and valuable as they are, are not absolute and must at times be temporarily curtailed in the exercise of the war power—which is the paramount and fundamental right of the public person, the Nation, to defend itself.[5]

> "Self-preservation is the first law of national life and the Constitution itself provides the neces-

[5] "If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty. Like every military control of the population of a dangerous zone in wartime, it necessarily involves some infringement of individual liberty • • •." (*Hirabayashi v. U. S.*, supra, at page 99.)

sary powers in order to defend and preserve the United States." (Hughes, War Powers Under the Constitution, ABA Reports, 1917, page 248.)

Of course, such an exercise of the war power must be reasonable under the circumstances to satisfy the "due process" requirements of the Fifth Amendment.

Hence, because of what has been so recently decided, the only substantial question here is whether or not, in the light of the authorized standard, there existed a rational basis for the decision of the military commander to evacuate and exclude all persons of Japanese ancestry from the Pacific coastal areas.

III.

AT THE TIME OF THE ISSUANCE OF THE EVACUATION ORDER AND CIVILIAN EXCLUSION ORDER NO. 34 UNDER IT, THERE WAS A RATIONAL BASIS FOR THE MILITARY DECISION TO EVACUATE AS A GROUP ALL PERSONS OF JAPANESE ANCESTRY.

In holding that there was a reasonable basis for the application of curfew to *all* persons of Japanese ancestry, citizens and aliens alike, residing within Military Area No. 1 and zones of other military areas within the Western Defense Command, this court, in the *Hirabayashi* case, found that the following factors provided that reasonable basis.

—In the early months of 1942, the results of the disastrous attack on Pearl Harbor and the Japanese land and naval advances in the Pacific area

afforded ample ground for reasonably prudent men charged with the responsibility of national defense to conclude that there was a danger that the Pacific Coast would be invaded and that measures had to be taken to meet that danger. (At p. 95.)

—"The challenged *orders*[6] were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage." (At pp. 94-95.)

—In the critical days of March, 1942, the danger to our war production by sabotage and espionage in the Pacific Coast area was obvious.

—The great majority (112,000 out of 126,000) of persons of Japanese ancestry resided in the States of California, Oregon, and Washington. (At p. 96.) See Chart 2, inserted opposite.

—Most of these persons were concentrated in or near ports of embarkation located in Military Area No. 1. (p. 97.) See Chart 3, opposite page 18.

—There was support for the view that social, economic and political conditions have intensified the solidarity of Japanese in this country and have in large measure prevented their assimila-

[6]This apparently alludes to the exclusion orders, which were also before the court. The decision, however, is carefully limited to the validity of the curfew order.

GEOGRAPHICAL DISTRIBUTION JAPANESE POPULATION

UNITED STATES 1940

NUMBERS INDICATE JAPANESE POPULATION
AS REPRESENTED BY ELEVATION OF STATE

Final Report Japanese Evacuation from the
Coast, 1942, p. 81, J. L. S. G. P. O., 1943.

tion as an integral part of the white population. (p. 97.)

—Attendance of large numbers of Japanese children at Japanese language schools, some of these schools being generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. (pp. 97, 98.)

—The education of a considerable number of American-born children of Japanese parentage in Japan for all or a part of their education. (p 97.)[1]

—Congress and the Executive, including the military commander, could have attributed special significance in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship.

—Statistics released in 1927 by the Consul General of Japan at San Francisco asserted that over 51,000 of the approximately 63,000 American-born

[1] In support of this finding, extended investigation since this decision, of Ship Manifests for 1930-1941, shows that 13,705 American-born males of Japanese ancestry returned through the ports of Los Angeles, San Francisco, and Seattle, after having lived in Japan. 5225 of the "Kibei" who were fifteen years of age or older had spent two or more years in Japan. The same records reveal that *during 1941 alone*, 1573 "Kibei" (including infants and children) entered west coast ports from Japan, and 1147 Issei, or alien Japanese, re-entered the United States from Japan. The 663 U. S. born male Japanese less than twenty-five years of age who re-entered west coast ports from Japan during 1941 had an average age of 18.2 years and had spent an average of 5.2 years in Japan. Of these, 239 had spent more than three years there. This latter group had spent an average of 10.2 years in Japan. Of the returning Japanese, more than 50% had a close relative in Japan. Derived from Ships' Manifests filed at the San Francisco, Seattle and Los Angeles Port Offices of the Federal Immigration and Naturalization Service, Department of Justice.

persons of Japanese parentage then in the western part of the United States held Japanese citizenship. (pp. 97-98 and footnote 8.)

—The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. (p. 98.)[8]

—Japanese Consulates had maintained the influence of the Japanese Government with the Japanese population in the United States. (p. 98.)[9]

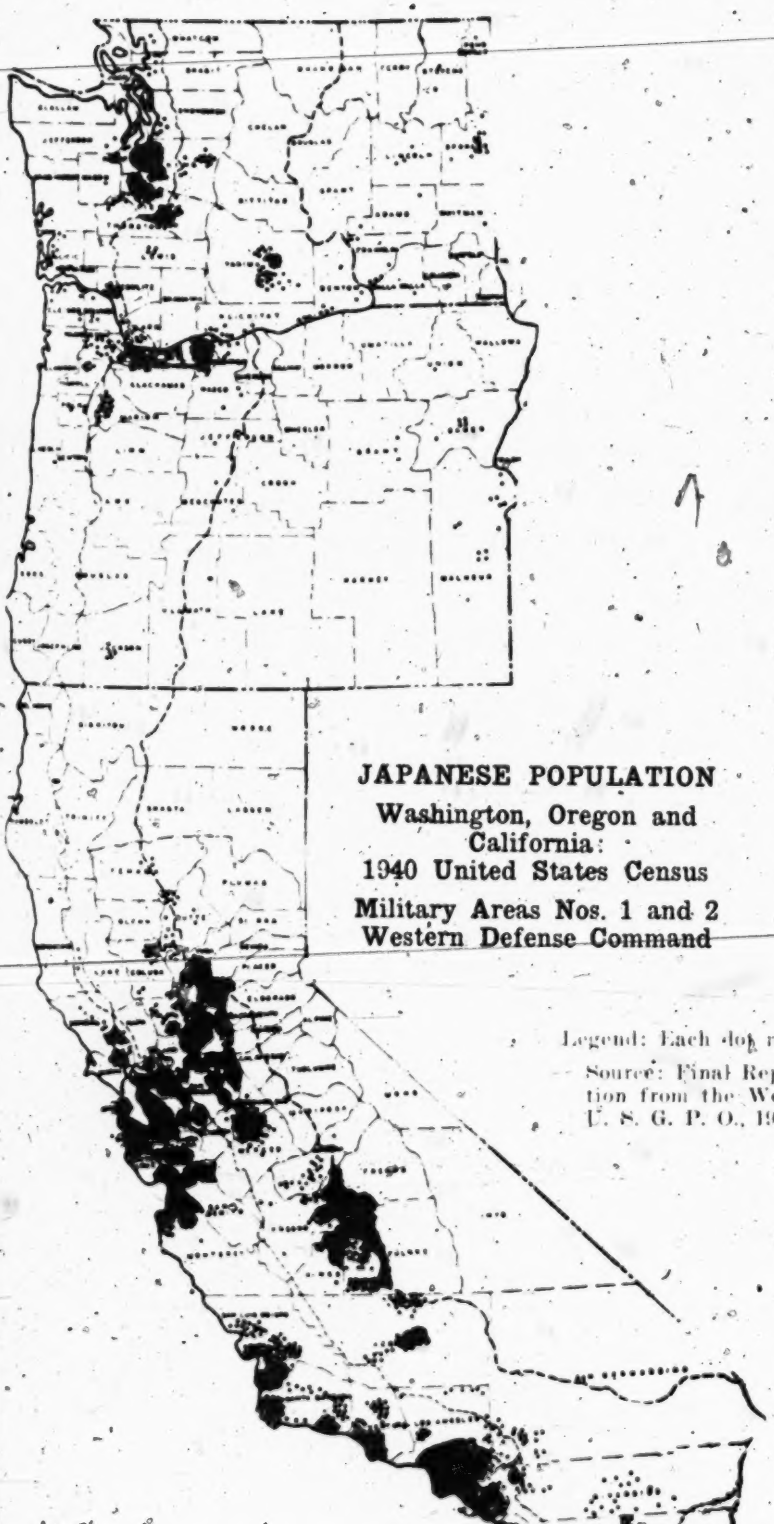
—The conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions. (p. 98.)

Summing up this part of the *Hirabayashi* case, this court declared:

"Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in deter-

[8]See "Significance of the Issei" in brief of these *amici curiae* in Hirabayashi brief, No. 870, 1942 Term, pp. 20-22.

[9]See "Japanese Nationalistic Organizations of the Pacific Coast" ibid., pp. 12-18.


JAPANESE POPULATION
Washington, Oregon and California:
1940 United States Census
Military Areas Nos. 1 and 2
Western Defense Command
Legend: Each dot represents to
Source: Final Report Japane
tion from the West Coast,
U. S. G. P. O., 1943.

> mining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack. The extent of that danger could be definitely known only after the event and after it was too late to meet it. Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress *that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.*" (pp. 98-99.)

When considering the foregoing factors to determine if they also provide a rational basis for the decision of the military commander to evacuate the Japanese as a group from coastal military areas, it cannot be emphasized too strongly that (in the words of this court) "The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942 many of which, since disclosed, were then peculiarly within the knowledge of the military authorities."[10]

It is submitted that the above summarized findings of conditions which existed at the time of the issuance

[10] pp. 93-94 of Hirabayashi opinion.

of the appellant's civilian exclusion order also support the reasonableness of the decision to exclude first by unregulated and then by regulated evacuation,[11] all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2. Voicing this same view, the court in *U. S. v. Fujii*, 55 F. Supp. 928 (1944), says of the Hirabayashi decision:

> "* * * yet it would seem that the same logic which led to the conclusion that the curfew law did not violate their (i.e. persons of Japanese ancestry) constitutional rights would justify a like conclusion in regard to removal and relocation." (p. 931.)

It is certainly understandable that the effects upon each individual's loyalty of the conditions set forth in the Hirabayashi opinion could not be readily determined among a group of over 100,000 people. Administrative hearings could not have been had in time nor could proper tests have been applied in the period when the critical military situation demanded the taking of the preventive action to offset the danger of sabotage and espionage.[12] It was at least doubtful if an adequate test could have been readily employed to judge such an imponderable as prospective loyalty. Only a brief consideration of the task of investigating and holding individual hearings for 100,000 people, with the usual "due process" steps taken in adminis-

[11] The reasons why voluntary relocation would not work, principally due to the hostility of communities outside the exclusion areas, are fully set forth in Government's brief herein.

[12] Hirabayashi opinion supra, p. 98.

rative hearings, reveals the difficulties and scope of he task and the time required.[13] To judge such an mponderable thing as prospective loyalty in these ases would call for a careful consideration, requiring ime and investigation, of the effect which the facts as oted by this court may have had upon the loyalty of he individual American-Japanese citizen.

Therefore, with these difficulties as to time and lack f investigative technique, it was reasonable for the nilitary commander to meet the danger threatened rom the unidentified disloyal members of the group y excluding the group as a whole.[14] As Mr. Justice Douglas has pointed out in his concurring opinion in he *Hirabayashi* case:

> "The orders must be judged as of the date when the decision to issue them was made. To say that the military in such cases should take the time to

[13]Even if such hearings were had for only American citizens of he group who were 17 years or older, approximately 40,000 indi- idual hearings would have been required. The estimate is based pon the U. S. Census for 1940, as published by the Statistical Division, Wartime Civil Control Administration, Bull. No. 12, p. 8, dated March 15, 1943.

[14]"• • • it can hardly be said to be unreasonable to go on the ssumption that among the Japanese communities along the coast here is enough disloyalty, potential if not active, to make it ex- edient to evacuate the whole. Perhaps ninety-nine peaceful Japa- ese plus an unascertainable one who would signal to a submarine ould add up to a sufficient reason for evacuating. If it were a natter of punishment, this sort of reasoning would be brutal. But o one supposes that evacuation, any more than detention under Regulation 18B in England, is defensible on any other basis than revention. When one considers the irreparable consequences to hich leniency might lead, the inconvenience, great though it may e, seems only one of the unavoidable hardships incident to the ar. In this judgment General DeWitt doubtless acted on such ntelligence as was available, and, it is to be remembered, with the xpress sanction of the President and the Congress'. (Fairman, he Law of Martial Rule and the National Emergency, 55 Harv. .R. 1254, 1302 (June, 1942).)"

weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it. But as the opinion of the Court makes clear, speed and dispatch may be of the essence. Certainly we cannot say that those charged with the defense of the nation should have procrastinated until investigations and hearings were completed. At that time further delay might indeed have seemed to be wholly incompatible with military responsibilities.

"Since we cannot override the military judgment which lay behind these orders, it seems to me necessary to concede that the army had the power to deal temporarily with these people on a group basis." (p. 107.)

The prospect that there were a substantial number who were disloyal but unidentified or whose potential loyalty required careful checking is now materializing.

Among those evacuated, 6096 persons of Japanese ancestry, of the age of 18 and over, born in the United States, have thus far requested expatriation to Japan. See Chart 4 inserted opposite. The number of applications has increased each month in the last six months.[15]

This loyalty question was asked of male citizens of Japanese ancestry, 17 years of age and older, in War Relocation Centers:

"Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attacks by foreign or domestic forces and foreswear any

[15] According to Repatriation Application Papers filed with the Wartime Civil Control Administration and the War Relocation Authority, as of September 21, 1944.

American-born Japanese Applying for Expatriation to Japan, by Age, Sex, Citizenship, Residence and Education in Japan: July, 1944*

Age and Sex	Total Applying for Expatriation	Citizenship Claimed		Residence in Japan by Number of Years								Education in Japan by Number of Years					
		Dual	U.S.	No Japanese residence	Less than one year	1-2 years	3-4 years	5-9 years	10-14 years	15-19 years	20 years and over	No Japanese education	Less than one year	1-2 years	3-4 years	5-9 years	10-14 years
Both Sexes																	
All ages	11,447	4,738	6,709	6,930	300	764	210	811	1,437	899	96	8,074	8	150	205	1,918	1,092
0-4 years	1,590	147	1,443	1,577	8	5	—	—	—	—	—	1,590	—	—	—	—	—
5-9 years	1,240	197	1,043	1,152	38	50	—	—	—	—	—	1,240	—	—	—	—	—
10-14 years	1,386	199	1,187	1,197	62	110	11	5	1	—	—	1,369	—	7	5	4	1
15-19 years	2,092	665	1,427	1,519	91	226	46	105	91	20	—	1,847	2	37	28	147	31
15-17 years	1,135	244	891	914	45	120	10	31	13	2	—	984	1	18	7	30	3
18-19 years	957	421	536	605	46	106	30	74	78	18	—	771	1	19	21	117	28
20-24 years	2,603	1,721	882	973	58	220	91	301	597	358	5	1,268	2	69	85	727	45
25-29 years	1,621	1,182	439	340	24	102	34	240	482	362	37	489	3	21	48	644	416
30-34 years	620	429	191	110	8	28	15	108	205	121	25	155	—	9	26	272	158
35 and over	295	198	97	62	11	23	19	52	61	38	29	116	1	7	13	124	34
Males																	
All ages	6,519	3,042	3,477	3,573	171	413	113	520	1,044	630	55	4,192	7	79	127	1,362	752
0-4 years	782	75	707	776	4	2	—	—	—	—	—	782	—	—	—	—	—
5-9 years	637	102	535	587	26	24	—	—	—	—	—	637	—	—	—	—	—
10-14 years	754	119	635	654	38	53	5	3	1	—	—	743	—	4	3	3	1
15-19 years	1,151	426	725	801	45	128	20	74	64	19	—	981	1	18	18	108	25
15-17 years	598	143	455	474	20	65	4	23	10	2	—	467	—	6	6	24	3
18-19 years	553	283	270	327	25	63	16	51	54	17	—	422	1	12	12	84	22
20-24 years	1,609	1,137	472	509	33	128	46	179	454	258	2	670	2	39	42	545	311
25-29 years	961	735	226	158	12	50	21	152	320	235	13	231	3	12	31	410	274
30-34 years	405	293	112	56	3	14	10	72	152	84	14	77	—	4	22	192	110
35 and over	220	155	65	32	10	14	11	40	53	34	26	71	1	2	11	104	31
Females																	
All ages	4,928	1,696	3,232	3,357	129	351	97	291	393	269	41	3,882	1	71	78	556	340
0-4 years	808	72	736	801	4	3	—	—	—	—	—	808	—	—	—	—	—
5-9 years	603	95	508	565	12	26	—	—	—	—	—	603	—	—	—	—	—
10-14 years	632	80	552	543	24	57	6	2	—	—	—	626	—	3	2	1	—
15-19 years	941	239	702	718	46	98	20	31	27	1	—	866	1	19	10	39	6
15-17 years	537	101	436	440	25	55	6	8	3	—	—	517	1	12	1	6	—
18-19 years	404	138	266	278	21	43	14	23	24	1	—	349	—	7	9	33	6
20-24 years	994	584	410	464	25	92	45	122	143	100	3	598	—	30	43	182	141
25-29 years	660	447	213	182	12	52	13	88	162	127	24	258	—	9	17	234	142
30-34 years	215	136	79	54	5	14	5	36	53	37	11	78	—	5	4	80	48
35 and over	75	43	32	30	1	9	8	12	8	4	3	45	—	5	2	20	3

*Information from Application Papers filed with the Wartime Civil Control Administration (Forms R-100 and R-101) and the War Relocation Authority (WRA 250).

Chart 4

form of allegiance or obedience to the Japanese emperor, or any other foreign government, power or organization?"

Out of 19,104 questionnaires checked, 4850 American citizens or 25.4% answered in the negative.[16] 9.7% of the female citizens of Japanese ancestry, 17 years of age and older, whose questionnaires were checked, also answered this question in the negative.[17]

It has now been discovered that many thousands of Japanese, resident in the United States, had a financial stake in Japan through the purchase of "Fixed Yen Deposits"[18] and other moneys on deposit in Japanese banks.[19]

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[16] "Table 1.—Response to question 28 (Form 304A) by relocation centers, male citizens of Japanese ancestry, 17 years of age and older, May 1, 1943." Some few qualified "Yes" answers are included in the figures given. Report of the Subcommittee of the Senate Committee on Military Affairs, May 7, 1943, approved by the Full Committee, 78th Cong. 1st Sess. p. 48. The replies represented 31,705 responses out of a total 39,710 citizens of Japanese ancestry in the age group.

[17] "Table 2.—Responses to question 28 • • • female citizens of Japanese ancestry • • • 17 years of age and older, May 1, 1943." See footnote No. 16 above for source.

[18] The August 1941 statement of the Yokohama Specie Bank, San Francisco Branch, now in the files of the California Superintendent of Banks, listed Fixed Yen Deposit Certificates owned by alien and citizen Japanese, resident in the Continental United States, valued at 80,923,670.07 yen deposited in Japan and representing 21,167 deposits. It is not clear from the statement whether this represents different depositors or the number of accounts. They would appear to be different depositors. The same files contain a letter from this branch directed to the West Coast Japanese in November 1938, which reads in part: "It is unnecessary for us to repeat that the transfer of money from America to Japan by the Japanese in this country is the result of their desire to support their Motherland. Under conditions of the present emergency, we ask you to make remittances and deposits, small or large, through our bank."

[19] The records of the California Superintendent of Banks show a Tabulation of Depositors in Japan according to Different Kens"

On the other hand it is likewise becoming evident that there are a large number of American-Japanese among those evacuated who were and are loyal to the United States. In time of war, however, a citizen, as a member of a particular group of citizens—the military age group, for example—may be called upon to make many a sacrifice of those things of liberty and property normally safeguarded by our Constitution. He may be required even to make the supreme sacrifice in his country's cause. If then, a citizen such as the appellant here, happens to be a member of a group of persons, among whom there are unidentified persons who are potentially disloyal, can it be said in view of the grave danger that his constitutional rights were improperly curtailed when he was required to move, as a member of the group, from sensitive military areas if that was a reasonable way to insure the removal of those other members of the group who might weaken our defense against invasion or interfere with the successful prosecution of the war by the commission of espionage and sabotage?

In time of war, evacuation has been held to be a reasonable method of removing potentially dangerous persons from critical military areas. (*Rex v. Halliday* (1917), 1 A. C. 260, affirming (1916) 1 K. B. 238; *King v. Governor of Wormwood Scrubbs Prison* (1920), 2 K. B. 305; *Greene v. Secretary of State for Home*

prefectures where the deposits originated through the West Coast offices of the Sumitomo Bank in the U. S. According to the January 31, 1939 statement, there were 54,270,698.23 yen on deposit in Japan to the credit of 12,676 individual depositors, who apparently were in large part West Coast Japanese.

Affairs (1942), 1 A. C. 284.)[20] The Canadian Government also found it necessary to order the removal of all persons of the Japanese race from a specified area along the Pacific Coast.[21] After reviewing the facts pertaining to the evacuation of appellant, the Ninth Circuit Court found that the principles of the *Hirabayashi* case so clearly sustained the validity of the evacuation that it said "* * * it is not necessary to labor the point". (*Korematsu v. U. S.*, 140 Fed. (2d) 289, 290.) That the evacuation of all persons of Japanese ancestry from military areas as a group was not, at the time and under the circumstances, a denial of due process, was directly held in *Ex parte Kanai* (46 Fed. Supp. 286 (D.C. E.D. Wis.)). See also *Ex parte Ventura* (44 Fed. Supp. 520 (W.D. Wash. N.D.)).

CONCLUSION.

A realistic consideration of the facts pertaining to the evacuation cannot avoid noting the charges made by appellant and others that the removal of alien and citizen Japanese from the Pacific Coast military areas was the result of pressure from "anti-Japanese"

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[20] The significance of the English authorities is discussed in the brief of these *amici curiae* in the *Hirabayashi* case. (p. 55.)

[21] Pursuant to the Defense of Canada Regulations, the Minister of Justice, by order dated August 18, 1942, established a protected area in the Province of British Columbia along the Pacific Coast, and in part stated:

"9. Every person of the Japanese race shall leave the protected area aforesaid forthwith.

"10. No person of Japanese race shall enter such protected area except under permit issued by the Royal Canadian Mounted Police." (Canada Gazette Extra No. 96, August 31, 1942.)

groups opposed to the Japanese for racial and economic reasons, who secured the removal under the cloak of a war measure.[22] There is no evidence that such pressure motivated the military decision. Because of the very fact that social and economic problems have existed in California, Oregon, and Washington, with reference to persons of Japanese ancestry, it is important that this court state that the action was taken as a matter of military necessity to safeguard national security from enemy action, both from without and from within.

This court has emphasized that except in the most unusual circumstances racial discriminations are prohibited.[23] The restrictions placed upon this group of our citizens must be removed as soon as the military authorities determine and the national security permits.

Dated, San Francisco, California,
October 4, 1944.

ROBERT W. KENNY,
Attorney General of the State of California.

GEORGE NEUNER,
Attorney General of the State of Oregon.

SMITH TROY,
Attorney General of the State of Washington.

FRED E. LEWIS,
Acting Attorney General of the State of Washington.

Attorneys for said States as Amici Curiae.

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[22]See Fortune Magazine for April, 1944, Vol. XXIX, p. 4 "Issei, Nisei, Kibei".

[23]See Murphy, J., in *Hirabayashi v. U. S.*, supra, pp. 110-111.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 22.

FRED TOYOSABURO KOREMATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF JAPANESE AMERICAN CITIZENS LEAGUE, AMICUS CURIAE.

SABURO KIDO,
Japanese American Citizens League,
Beason Building,
Salt Lake City 1, Utah;

A. L. WIRIN,
257 South Spring Street,
Los Angeles 12, California;

Counsel, Japanese Americans Citizens League, Amicus Curiae.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 22.

FRED TOYOSABURO KOREMATSU,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF JAPANESE AMERICAN CITIZENS LEAGUE, AMICUS CURIAE.

The Interest of the Japanese American Citizens League.

The Japanese American Citizens League is a national organization of American citizens of Japanese ancestry organized in 1930. When Lt. Gen. J. L. DeWitt issued the military evacuation orders directed only against persons of Japanese descent, the Japanese American Citizens League, at the request of the military authorities cooperated in the evacuation without, however, conceding its constitutionality.

When after the evacuation, American citizens of Japanese ancestry were not permitted by the War Department to serve in the armed forces, the Japanese American Citi-

zens League urged the War Department to afford to American citizens of Japanese descent an opportunity to contribute their share to the winning of the war by offering their services and their lives. As a result of these efforts the War Department and the Selective Service System finally made provisions for Americans of Japanese descent first, to volunteer; and then to be inducted into our Armed Forces. The first to volunteer his services in the specially created Japanese American Combat Team was Mike Masoaka, secretary of the Japanese American Citizens League. Mr. Masoaka is now in Italy as a member of our Armed Forces.

The members of the Japanese American Citizens League have thus recognized their *obligations* as American citizens; in this proceeding, by this brief *Amicus Curiae*, they claim their *rights* as American citizens—including the right to be free from discrimination because of race or ancestry.

Summary of Argument.

There is no reasonable basis for the military exclusion orders affecting American citizens of Japanese ancestry. Neither the numbers nor the distribution of those of Japanese ancestry on the Pacific Coast constituted a "military necessity." Few Americans of Japanese ancestry are dual citizens and dual citizenship was no legitimate basis for the evacuation orders. Japanese language schools were neither unique nor subversive and their graduates have served America loyally in the present crisis. The religious views of resident Japanese and Americans of Japanese ancestry constituted no danger to internal security and provided no legitimate reason for evacuation. The Kibei were a small group whose members could have been easily located and controlled; many of them are patriotic Americans who have performed extensive wartime service for this country. The many effective measures applied by the Department of Justice before removal made evacuation unnecessary. The doctrine of "protective custody" is un-American and dangerous to our institutions. There was no public threat to persons of Japanese ancestry, and no genuine popular demand that they be removed. Contrary to unsubstantiated assumptions and assertions, Americans of Japanese ancestry are well assimilated and loyal. Abundant and reliable information was on hand to prove this at the time of the evacuation. Evacuation was not a military necessity but was due to false reports of sabotage in Hawaii, to the activities of anti-oriental pressure groups and unscrupulous competitors; and most important of all to the admitted race prejudice of the Commanding General who issued the evacuation orders.

ARGUMENT.

There Was No Reasonable Basis for the Military Exclusion Orders Affecting American Citizens of Japanese Ancestry; and Hence They Are Unconstitutional.

1. The Grounds Which Are Claimed Constitute the Alleged Military Necessity for Evacuation Reviewed.

When the Attorney General of the United States announced to the nation that the President, by Executive Order, had authorized the Secretary of War or those to whom he delegated this power, to eject citizens or aliens from designated areas, he admitted that he "knew of no other instance when this country had set up a plan which could involve a mass evacuation."[1] The manner in which this grant of power has been exercised has been a matter of grave concern to all students of government and of minority questions. Attorney General Francis Biddle has himself raised this question, declaring:

> "The legal theory on which they (citizens of Japanese ancestry) were excluded was that anyone—citizen and alien alike—could be moved out of a war area for its protection. The theory was valid enough. But, like most theories, its ultimate test depended on the reasonableness of its exercise."[2]

In commenting upon a much less drastic restriction upon the individual and the group, the imposition of a

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[1]Special Washington, D. C. dispatch of Lewis Wood to the *New York Times*, February 20, 1942. *New York Times*, February 21, 1942.

[2]In "Democracy and Racial Minorities," an address delivered at the annual dinner of the Jewish Theological Seminary of America, November 11, 1943. Printed in *Common Ground*, Winter, 1944.

curfew regulation, one of the Justices of this Court has already stated:

> "The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power."[3]

In this opinion Mr. Justice Murphy made it clear that he was able to accept the validity of even this limited restriction only because he felt that "the military authorities could have reasonably concluded at the time that determinations as to the loyalty and dependability of individual members of the large and widely scattered group of persons of Japanese extraction on the West Coast could not be made without delay that might have had tragic consequences."[4]

But in his opinion Mr. Justice Murphy comes essentially to the same position as that which has been cited for Attorney General Biddle, namely, that the validity of orders and restrictions imposed by the military under the authority of the Executive Order depends upon the "reasonableness of its exercise." In regard to this he declares:

> "I do not wish to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever, so that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as 'military areas.' While this Court sits, it has the in-

[3] *Hirabayashi v. United States*, 320 U. S. 81, p. 111.

[4] *Ibid.*, pp. 112-13.

escapable duty of seeing that the mandates of the Constitution are obeyed. That duty exists in time of war as well as in time of peace, and in its performance we must not forget that few indeed have been the invasions upon essential liberties which have not been accompanied by pleas of urgent necessity advanced in good faith by responsible men."[5]

The same line of reasoning runs through the opinion of the Court and the other concurring opinions. Speaking for the Court Mr. Chief Justice Stone said:

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."[6]

The inference is that if relevant and available facts bearing upon the loyalties of elements of the population were *not* considered, if decisions were made on the basis of misinformation or misconception, if substantial evidence is produced of unreasonable prejudice against a group on the part of the man or men who requested the authority and then utilized it against the group in question, this Court

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[5]*Ibid.*, p. 113.

[6]*Hirabayashi v. United States*, Opinion of the Court, p. 100.

will reject all invasions of the liberties of citizens that go beyond the curfew regulations; and would want, we feel sure, even to review its past decision concerning curfew regulations in the light of new evidence of this nature which may be placed before it.

The concurring opinion of Mr. Justice Douglas rests, in good measure, upon the assumption of the good faith of the military commander who ordered the curfew regulations and upon the belief that he entertained and utilized available information, for he says:

> "If the military were right in their belief that among citizens of Japanese ancestry there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency. We must credit the military with as much good faith in that belief as we would any other public official acting pursuant to his duties."[7]

That he would not uphold even the curfew regulation if he were convinced that factors not directly related to the military situation were involved Mr. Justice Douglas indicates when he states:

> "Loyalty is a matter of mind and of heart not of race. That indeed is the history of America. Moreover, guilt is personal under our constitutional system. Detention for reasonable cause is one thing. Detention on account of ancestry is another."[8]

In the other concurring opinion, Mr. Justice Rutledge, in describing the latitude which a military officer's duties

[7] *Hirabayashi v. United States*, Douglas, J., concurring, pp. 105-06.

[8] *Ibid.*, pp. 107-08.

justify without bringing the judicial power into play, wrote these significant words:

> "The officer of course must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen."[9]

The action being contested here as unconstitutional is the forcible ejection of American citizens from their homes and places of employment at short notice, under penalty of law, by military force, and without accusations, hearings or trials. In the upheaval much of the personal property of these American citizens have been lost. In their absence, among other things, their names have been erased from civil service rolls[10] and legislation (such as the Lowrey Act of California) has been passed which authorizes seizure of their property.[11] As a result of their prolonged exclusion, interests and possessions have had to be abandoned or sacrificed because they have not been able to properly safeguard or care for them.[12] If a rela-

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[9] *Hirabayashi v. United States*, Rutledge, J., concurring, p. 114.

[10] For data concerning the progressive elimination of Americans of Japanese ancestry from city, county and state civil service rolls see: *Local Civil Liberties Committees Reports 1941-1942*, American Civil Liberties Union, 170 Fifth Ave., New York City, June, 1942, p. 1; Howard Costigan, "The Plight of the Nisei," *The Nation*, Feb. 14, 1942, p. 185; *California Daily News (Kashu Mainichi)*, Los Angeles Japanese community newspaper, Feb. 2, 11 and Mar. 5, 20, 1942; *Los Angeles Japanese Daily News (Rafu Shimpo)*, Feb. 11, Apr. 3, 1942; *Pacific Citizen* (weekly newspaper published by the Japanese American Citizens League at Salt Lake City, Utah), Oct. 15 and Nov. 26, 1942.

[11] California State Assembly Bill 1975 as amended by the State Senate May 5, 1943.

[12] Edmonia Grant, "That All May Be One," pamphlet issued by National Intercollegiate Christian Council, 600 Lexington Ave., New York, N. Y., Oct. 9, 1942, p. 2; *New York Times*, Mar. 10, 1942, special dispatch from San Francisco of Correspondent Davies, Mar. 1942; Richard C. Mills, "Second Report on the Japanese Evacuation Situation," Y. M. C. A. and Y. W. C. A., 715 South Hope St., Los Angeles, Calif., Mar. 24, 1942, pp. 1-2.

tively mild curfew regulation imposed upon citizens brought us "to the very brink of constitutional power" it is evident that a mass evacuation of American citizens without hearing or trial has plunged us into unwelcome depths below.

We conclude, then, that much less serious infringements of the rights of citizens than evacuation have been countenanced by the courts thus far only because of an alleged military necessity and because the courts, at a critical time, desired to give the military commanders every legitimate aid and every benefit of the doubt in the prosecution of the war.

Nor has the Military or the Government ever tried to defend or to explain evacuation except on the grounds of "military necessity." At the time of the declaration of war there were persons of German ancestry, of Italian ancestry, and of Japanese ancestry on the West Coast, individuals who might be identified in the popular mind with one or another of the three most powerful nations against which we were fighting. In the case of those of German and Italian ancestry, citizens were in no way disturbed in their movements or material interests and such restrictions as were placed upon the aliens were speedily removed. In the case of those of Japanese ancestry curfew, travel and contraband restrictions were imposed on citizens as well as on aliens and finally the whole group, regardless of citizenship, was removed from the area designated by the military commander and placed in detention.

If military necessity and not race prejudice dictated this differential treatment, two main claims must be established: (1) that the danger was so real and immediate and the people of Japanese ancestry constituted so danger-

ous an element that the drastic action taken and the rejection of alternatives were reasonable, and (2) that the Caucasian groups of enemy ancestry were manifestly less dangerous.

In connection with the second point particularly, it would seem necessary to establish that white men in America are judged by the same criteria which are applied to yellow men. If part of the "military necessity" for evacuating persons of Japanese ancestry from the West Coast relates to their numbers, it is relevant to determine whether those of German or Italian ancestry were not as numerous or more numerous. If part of the charge is that "Japanese" were concentrated in certain areas—that, to use the provocative language of the military, they were "deployed" around sensitive areas and "surrounded" important installations, it is only justice to determine where the Germans and Italians were "deployed" and what they "surrounded." If the causes for alarm were language schools, dual citizenship, or organizations encouraged by the homeland, it is but elementary justice and honesty to inquire into the status, activities or attitudes of those of German and Italian backgrounds on these points.

There is no longer need to speculate concerning the nature of the alleged "military necessity" because of which the military commander of the Western Defense Zone ordered evacuation. Two documents are now available in which the General responsible for the orders offers his explanation of why the step was taken.[12a]

The first document is the Memorandum from General J. L. DeWitt to the Secretary of War dated February 14,

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[12a] The matters contained in the Government's Brief in the *Hirabayashi* case, of which this Court took judicial notice in its opinion in that case, are substantially the same as the material contained in these documents.

1942, in which the Commanding General of the Western Defense Command and Fourth Army requested the authority for removal which later was delegated to him. The subject of the Memorandum is given as "Evacuation of Japanese and *Other* (emphasis ours) Subversive Persons from the Pacific Coast," a title which we feel well reveals the bias, conscious or unconscious, of the source from which it came. This significant document became available July 19, 1943, when it was published as an Appendix to Chapter III of General DeWitt's *Final Report on the Japanese Evacuation From the West Coast.*[13]

The first section of the Memorandum details the destruction that theoretical enemy action or sabotage could accomplish along the Pacific Coast. The second section, with which we are primarily concerned, contains the reasons for proposing that all those of Japanese ancestry, including American citizens, be evacuated. The core of the thinking is reflected in this excerpt:

> "In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become Americanized," the racial strains are undiluted."[14]

From this extraordinary doctrine of "race warfare" the General drew an equally extraordinary conclusion. "It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are

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[13] *Final Report: Japanese Evacuation from the West Coast 1942*, United States Government Printing Office, Washington, 1943. Transmitted to the Secretary of War by the Chief of Staff July 19, 1943. This volume will be referred to hereafter as *Final Report* of General DeWitt.

[14] *Ibid.*, p. 34.

at large today." By the application of a strange variety of logic the blameless behavior of those of Japanese ancestry is turned against them, for the General concludes the section with this observation: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

Under the heading of "Disposition of Other Subversive Persons" General DeWitt wrote;

> "Disposed within the vital coastal strip already mentioned (note that Germans and Italians are never 'deployed') are large numbers of Italians and Germans, foreign and native born, among whom are many individuals who constitute an actual or potential menace to the safety of the nation."[15]

The General then recommended that military areas be designated from which all "Japanese," all alien enemies and other suspected persons be excluded. He recommended that all of the enemy aliens, including Germans and Italians, *be interned, under guard*. He further suggested that American citizens of Japanese ancestry be offered the opportunity to accept voluntary internment under guard at the same places selected for their alien parents, and that those who declined this "offer" be excluded from *all* military areas. A refinement of the General's plan was that "adult males (above the age of 14 years) be interned separately from all women and children until the establishment of family units can be accomplished."[16]

From this we gather that on February 14, 1942 General DeWitt deemed it a "military necessity" that all Ger-

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[15] *Ibid.*, p. 35.

[16] *Ibid.*, p. 37.

man and Italian aliens, as well as persons of Japanese ancestry, be ejected from the West Coast and interned. He even envisaged clearing the entire eight states under his command of them. A storm of protest arose when the General threatened to evict the 82,000 German and Italian enemy aliens of the three West Coast States.[17] This time he was dealing with Caucasian groups and with segments of the population whose friends and relatives were economically and politically entrenched. Needless to say, the General's conception of what "military necessity" demanded in the way of the treatment of civilians was executed only in regard to persons of Japanese ancestry. It is now obvious that if General DeWitt's formula had been followed in regard to Germans and Italians much needless hardship and injustice would have resulted. There is no reason to believe that General DeWitt was more correct in his construction of what "military necessity" demanded in respect to the Japanese and their children than he was in the case of Germans and Italians.

The other document purporting to state the reasons, events and situations which together crystalized to form General DeWitt's definition of "military necessity" is his *Final Report*.[18] In his foreword the Secretary of War,

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[17]For some indication of the reaction which this evoked see, Report of the *Select Committee Investigating National Defense Migration* (Tolan Committee), 77th Congress, 2d Session, House Report No. 1911, Mar. 19, 1942, pp. 22-25; and Report of the *Select Committee Investigating National Defense Migration*, 77th Congress, 2d Session, House Report No. 2124, May 13, 1942, pp. 25-31. Hereafter these two Reports will be referred to respectively as *Tolan Committee Report* of March, 1942, and *Tolan Committee Report* of May, 1942.

[18]*Final Report* of General DeWitt, particularly pages vii and viii and pp. 3-24.

to whom it was transmitted, writes: "The considerations which led to evacuation as well as the mechanics by which it was achieved, are set forth in detail." The "considerations," though their treatment is somewhat expanded, are essentially the same ones that have been outlined in General DeWitt's earlier Memorandum. The people of Japanese ancestry are described as populous, concentrated in residence and as an "unassimilated, tightly knit racial group." It is asserted that their loyalties were unknown, that no means existed for distinguishing the loyal from the disloyal, and that time did not permit any attempt to do so. The danger to which early Japanese successes exposed the Coast is emphasized. The existence of Japanese organizations and Japanese language schools is cited. It is charged that individuals and groups from among those of Japanese ancestry made contributions to the Japanese war effort during the phase of the China war which preceded Pearl Harbor. The existence of a group of American citizens who have lived and studied in Japan (kibei) is given considerable attention. A relationship between these facts and unauthorized radio communications, signal lights and attacks on ships leaving West Coast ports is inferred. It is strongly hinted that the dropping of an incendiary bomb near Mt. Emily in Oregon by a seaplane, and the shelling of the coast by submarines near Santa Barbara, California and Astoria, Oregon were made possible by the activities of residents of Japanese ancestry.

All of these "considerations" will be examined and it will be established that those of them which are not pre-

posterous and false are at the very least exaggerated and distorted.

It is particularly important to distinguish fact from fancy in questions relating to evacuation and to separate the findings of trained and reliable investigators from the hyperbole which General DeWitt borrowed from the professional and semi-professional anti-Orientalists of the West Coast, because this Court, in the *Hirabayashi* decision, accepted without question a large number of the General's assertions and "reasons" as they were presented in the Government's brief in that case. There is a vast difference between banishing a people from several states and ordering a curfew and we do not anticipate that the "reasons" accepted as justifying curfew, even if they were to go unchallenged, would be stretched by this Court to cover the more serious abridgment of citizenship rights at issue in this case. But it is disquieting that sweeping and unsubstantiated generalizations which run counter to the weight of evidence and the findings of impartial inquiry were accepted by this Court and even quoted with approval in its opinion in the *Hirabayashi* case. As we review the evidence, therefore, we shall call attention to those fundamental points where, in our view, the Court relied upon inadequate or misleading material and therefore reached conclusions which we believe are in error.

2. Neither the Numbers nor Distribution of Those of Japanese Ancestry Constituted a "Military Necessity."

The unabashed exaggeration and distortion of facts which created a "military necessity" where none really existed extended to many phases of the situation and involved many subtleties, but it can be most easily and clearly demonstrated in the realm of numbers. Let us examine, for instance, the figures which General DeWitt cited in his memorandum to the Secretary of War wherein he requested authority to proceed with evacuation. The General said:

> ". . . along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity."[19]

Understandably the Secretary of War was impressed by this strong representation. But let us consider the facts. There were, at that time, a total of 112,353 persons of Japanese ancestry in the three West Coast States. This included men and women, citizens and aliens, the well and the sick, infants and the aged. A General who includes women, children, the aged and the infirm among "enemies . . . ready for concerted action" must know better, and may legitimately be suspected of engaging in some special pleading. We doubt that General DeWitt was really terrorized by the 7,000 children under five years of age or the 15,500 children under ten years of age included in his figure.[20]

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[19] *Ibid.*, p. 34.

[20] *Wartime Civil Control Administration, Statistical Division, Bulletin 12*, March 15, 1943, pp. 8-14.

Let us see precisely how "dangerous," even in a theoretical or statistical sense, the West Coast population of Japanese ancestry really was. Of the 112,353 total, 49,499 were women.[21] Males under 14 years of age numbered 12,792. There were 2,147 males over 65 years of age.[22] Over a thousand of the remaining males were hospitalized, institutionalized or were suffering from infirmities which would reduce their military usefulness to zero.[23] This leaves less than 46,000 males between the ages of 14 and 65, an age range which, of course, includes many who are too young or too old to serve any cause. Moreover, at the time General DeWitt sounded his alarm, several thousand young men from this group had either volunteered or had been drafted into the United States Army. Ignoring for the moment the unsubstantiated charge that the population of Japanese extraction was sympathetic to Japan in her contest with the United States, we see that the number of persons about whom the General could conceivably be at all concerned *was just one-third of the figure he quoted.*

To reduce this whole question of population and characteristics of population to proper perspective and proportion it may be well to review the basic facts concerning the numbers and distributions of those of Japanese extraction in the United States and on the West Coast. On mainland United States in 1940 there were a total of 126,943 persons of Japanese ancestry.[24] This is less than

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[21] *Ibid.*, p. 4.

[22] *Ibid.*, p. 8.

[23] *Ibid.*, pp. 153-54; *Final Report* of General DeWitt, p. 200.

[24] *Tolan Committee Report* of May, 1942, Table 2, p. 94.

one-thousandth of our population. Of these only 47,307 were Japanese in the correct sense of the term; the rest, approximately two-thirds, were American citizens.[25] The Japanese or aliens constituted just .0003 of our national population. Never has so much din been raised over so few people! Never could a populous nation better afford to be generous and just without jeopardizing internal security!

In the decade 1930-1940 the "Japanese" population dropped to 126,943 from 138,834,—a reduction of 11,887 or 8.6 percent.[26] The male population decreased by 12 percent and the female population by 3.7 percent during this period.[27] It may be added that this is the only stock in the country which showed a decrease for the decade. Between 1930 and 1940 Whites increased by almost 18,000,000. One million were added to the Negro population, and there was a gain of 3,000 in the Chinese population. Even the "disappearing Indian" showed an increase.[28] It seems like an especially poor time to fret over the number of "Japanese" in this country.

Even on the West Coast, where the Japanese were alleged to be numerous and concentrated, they formed but a minute fraction of the total population. The 40,869 Japanese nationals[29] comprised but .004 of the nearly 10,000,00 inhabitants of the West Coast.[30] All persons

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[25] *Ibid.*, Table 3, p. 94.

[26] *Ibid.*, Table 2, p. 94.

[27] *Ibid.*, p. 91.

[28] These figures are from *Sixteenth Census of the United States, for 1940.*

[29] *Wartime Civil Control Administration, Bulletin 12*, p. 4.

[30] *Ibid.*, p. 2.

of Japanese ancestry in this area formed but .011 of the total population in these three states. In California those of Japanese ancestry formed no more than .013 of the population in 1940.[31] In 1930 they had constituted .017 of the population.[32] In the State of Washington, all those of Japanese ancestry constituted .008 of the population. In the State of Oregon the pitifully small group of 4,071 persons of Japanese ancestry comprised no more than .003 of the population of that state.[33] In point of fact the State of Nevada had a higher proportion of Japanese in its population in 1940 (.0042) than did Oregon and so did the State of Utah with its .004.[34]

Not only are the people of Japanese ancestry a helpless and insignificant minority in point of numbers but their age distribution makes them particularly innocuous. Oriental exclusion has been in effect since 1924. The immigrants, the aliens, are therefore necessarily long-time residents of this country, and most of them are advanced in age. The average age of the alien male at the time of the outbreak of the war was approximately 55 years.[35] In 1940 more alien males (36.04 percent) fell into the 55-64 age group than into any other.[36] Since the male immigrants tended to establish families rather late in life, after they had achieved some economic security, their children are only now growing to maturity. In 1940 thirty-nine

[31] *Ibid.*, p. 4.

[32] *Idem.*

[33] *Idem.*

[34] *Wartime Civil Control Administration Bulletin 12*, p. 7.

[35] *Ibid.*, p. 8.

[36] *Tolan Committee Report* of May, 1942, Table 4, p. 95.

percent of the citizens were 15 years of age or younger.[37] The termination of all Oriental immigration twenty years ago prevented a middle-aged group from forming and has divided the population into the extremes of youth and age. All this has bearing on the amount of aid and comfort that could conceivably be lent an enemy, something that General DeWitt must have known and should have taken into consideration.

Equally erroneous are the charges that the Japanese have concentrated in vital areas. It has been claimed time and again that they came in disproportionate numbers and for no good purpose to the Los Angeles area. The simple truth is that there were a substantial number of persons of Japanese ancestry in the Los Angeles area because a large percentage of all the people of California live in the Los Angeles area. For example, 2,904,596 people lived in the Los Angeles Metropolitan area in 1940.[38] This is 42 percent of the 6,907,387 people of the State.[39] At this time in this same area 38,350 persons of Japanese ancestry were living. They represented slightly less than 41 percent of the 93,717 persons of Japanese ancestry in the State.[40] In other words, in spite of all the talk about "Little Tokyo," the "Japanese" were not quite represented in the Los Angeles area in proportion to their numbers in the State.

The same is true of population proportions in the San Francisco Bay area, a region which the Japanese had sup-

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[37] *Wartime Civil Control Administration*, Bulletin 12, p. 8.

[38] *Sixteenth Census of the United States, for 1940, Population, Second Series, Characteristics of the Population (Dept. of Commerce): California.*

[39] *Ibid.*

[40] *Ibid.*

posedly "surrounded" and around which they had allegedly "deployed." San Francisco's 634,536 people comprised .09 of the people of the State in 1940. But the 5,280 persons of Japanese ancestry in San Francisco constituted only .056 of the total of this group in the State.[41] Clearly, if any group was "concentrating" in San Francisco out of proportion to its numbers in the State, it was not the "Japanese."

Nor is there even a grain of truth in the insinuations or assertions that the people of Japanese ancestry were changing residence to "deploy" in the vicinity of military installations and public utilities. After an extensive survey of the distribution of the West Coast "Japanese" over the years the Tolan Congressional Committee concluded that "the main geographic pattern of Japanese population in California was pretty well fixed by 1910."[42] The figures of the 1940 census, reproduced by the Tolan Committee in its Report, indicate that the "Japanese" population was remarkably stable and that, because of the general decline in population there was a proportionate decrease in numbers in most sections. In fact, the 1940 census reveals that in the preceding decade population gains of "Japanese" were registered in only 16 of the 58 counties of the State of California. In nine counties the gain was less than 50. In only five counties was the increase over 100. In but two counties was the increase as much as 300. And in these counties there were general gains of population which dwarfed the Japanese contribu-

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[41] *Ibid*

[42] *Tolan Committee Report* of May, 1942, p. 93.

tion.[43] There is no mystery about where those of Japanese ancestry settled, or why they settled there. Such studies as Brown's *The Japanese of Florin*[44] and Starnes' *History of the Japanese People in Oregon*[45] have demonstrated the economic basis of the population trends. As for the military installations and utilities, it is well known that the "Japanese" who were found living in their vicinity had been carrying on their economic tasks peacefully in these regions long before (often, as the *Tolan Committee Report* indicates, 30 years before) these sites were ever considered for defense installations and, indeed, before the international tensions which made arming necessary were even envisaged.[46]

The tactics used in discrediting the Japanese and in creating an impression of "military necessity" are particularly reprehensible and dangerous, for, if they are allowed to go unchallenged they may become the means by which any group can be similarly victimized. They consist primarily in the solemn recitation of facts and figures about one group in such a manner as to disguise that these circumstances are equally true of all groups. It is as though crime statistics relating to one group were separately and repeatedly publicized without regard to the general picture of which they are a part, until a definite conviction is established in the public mind that the group in question is criminal and undesirable.

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[43] *Ibid.*, p. 97.

[44] Alice M. Brown, *Japanese in Florin*, Greencastle, Pa., 1943.

[45] Marjorie R. Stearns, *History of the Japanese People in Oregon*, University of Oregon, Eugene, Oregon, 1937.

[46] *Tolan Committee Report* of May, 1942, p. 97.

For example, it is constantly reiterated that a little less than 72 percent of those of Japanese ancestry in the State were "concentrated" in seven California counties (Los Angeles, Sacramento, San Francisco, Alameda, Fresno, San Joaquin and Santa Clara).[47] But it is never mentioned that these counties are the population centers of the State within which more than two-thirds of *all* the people lived.

Let us see what happens when the same reasoning and statistical juggling are applied to Germans and Italians. In the same seven counties live 53,989 of the 71,727 residents of California who were born in Germany.[48] This is over 75 percent of foreign-born Germans. The German aliens in these counties numbered 15,327, and this turns out to be nearly 79 percent of the 19,418 German aliens of the State. Evidently the Germans, particularly the enemy aliens, were "deploying" much more successfully than the Japanese. If we take the seven counties in which the German-born are most numerous (by a remarkable coincidence they include six of the seven counties which have been cited for the Japanese) we find that 79 percent of them have "concentrated" therein. And 80 percent of all the German aliens of the State have managed to crowd into seven choice counties.

The Italians must have been receiving directions from abroad concerning where to settle, too, if the same line of reasoning be applied, for 68 percent of the Italian-born of the State (67,926) and 67 percent of the Italian aliens (34,700) resided in the same seven counties where the

[47] *Ibid.*, p. 92.

[48] *Ibid.*, Table 4, p. 232.

presence of the Japanese was regarded with suspicion.[49] If the seven counties containing the greatest number of Italian-born be selected (and five of them are the same ones in which the largest number of Japanese reside) it will be found that 71,890 or 72 percent of the State's 100,911 Italian-born persons are involved.

In other words, if it had been admitted or indicated that the population distribution for the Japanese was *more normal* and *less concentrated* in areas of military importance than that of the Germans and Italians, how much possibility would there have been of convincing the President, the Secretary of War or the Courts, that the Japanese were *the* dangerous element?

Further, if as much attention had been directed to the number of Germans and Italians in the State as was devoted to the existence of Japanese, public temper and ultimate decisions might have been quite different. Japanese aliens (which simply means those born in Japan, since Japanese are not permitted to naturalize) numbered 40,869 in the three West Coast states. In the same area the Italian-born numbered 113,846,[50] a figure greater than that for the Japanese aliens and Americans of Japanese ancestry combined. Though Italians are able to naturalize, the 57,797 Italian aliens of the West Coast outnumbered the Japanese aliens by many thousands.[51] If all those of Italian ancestry are considered there is simply no comparison between the number of Italians and the number of Japanese on the West Coast. Also, it should

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[49] *Idem.*

[50] *Tolan Committee Report* of May, 1942, Table 2, p. 230.

be noted that the Italian aliens are in average a younger and more vigorous group than are the Japanese. The largest group of Italian aliens falling into one age category (30.22 percent) are between 45 and 54 years of age.[52] Moreover, the large percentage (50.77 percent) of aliens among foreign-born Italians cannot be attributed to recency of arrival. Eighty-six and a half percent of these aliens entered the United States in 1924 or before.[53]

Numerical comparisons between Germans and Japanese on the West Coast give much the same result. In 1940 there were 97,080 persons on the West Coast who were born in Germany.[54] With their children and grandchildren (the manner in which "Japanese" are totaled) they constitute a much larger group. Among them are 24,199 aliens.[55] The Germans, like the Italians and the Japanese are "concentrated" in California, where 71,727 have made their homes.[56]

Obviously, if anyone had sought to capitalize on these figures it would have been comparatively easy to do so. For instance, it would not have been difficult to arouse the apprehensions of the citizens of the San Francisco-Oakland Metropolitan District by confronting them with glaring headlines which advised them that they were beset and surrounded by 42,861 foreign-born Italians and 24,387 foreign-born Germans (compare with 4,676 foreign-born

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[52] *Tolan Committee Report* of May, 1942, Table 12, p. 243.

[53] *Ibid*., Table 11, p. 242.

[54] *Ibid*., Table 2, p. 230.

[55] *Idem*.

[56] *Idem*.

Japanese in the same area) and that the Golden Gate bridge and the harbor installations were all but in enemy hands. And had such alarmist methods prevailed (General DeWitt, it will be remembered, very nearly set them in motion) we would have still another minority "problem" on our hands in this country today.

The story of the great numbers and peculiar concentration of the Japanese on the West Coast is a myth. It affords no reasonable basis or support for the special treatment meted out by the military to all persons of Japanese descent, and to no person of any other descent. It is important to set forth these facts clearly and in detail, because *in Hirabayashi v. United States* this Court apparently accepted without question the figures given by General DeWitt and cited in the Government's brief. In the Opinion of the Court the figure of 112,000 potentially dangerous persons (which included infants, the aged and young men in our own armed services) is quoted with approval, and it is assumed in addition that some unusual concentration of those of Japanese ancestry existed.[57] In the concurring opinion of Mr. Justice Douglas the matter of numbers and the alleged concentration near "key points" also looms large.[58]

It does not follow that impressions concerning the characteristics of the people of Japanese ancestry as a group which this Court considered sufficient reason for the imposition of a curfew would be accepted as a serious enough threat to justify evacuation. But in those matters

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[57] *Hirabayashi v. United States*, 320 U. S. 81, p. 96.

[58] *Ibid.*, p. 105.

which concern the appeal of the few and the weak to the highest Court in the land, any deviation from truth and perspective is inexcusable. And as the issues mount in importance it is not too much to ask that this Court inquire even more carefully into those figures and arguments which would picture us as a people divided and in conflict.

3. Few Americans of Japanese Ancestry Are Dual Citizens and Duel Citizenship Was No Legitimate Basis for Evacuation.

One of the principal arguments used by General DeWitt and his spokesmen to justify a "military necessity" compelling evacuation an argument accepted by this Court in the Hirabayashi case has been that the people of Japanese ancestry constituted a danger out of proportion to their numbers because of their ties with Japan. The "tie" that is always mentioned, since the aspect of evacuation which is most difficult to explain is the banishment of American nationals, is dual citizenship. It is claimed that a large proportion of American citizens of Japanese ancestry are also citizens of Japan, and responsible men and even judges have asserted that Japan claims all American-born children of her nationals as her citizens too. This reasoning was a factor in the earliest decision dealing with evacuation.[59] The person on whose behalf this early petition was filed is an American woman of Japanese ancestry who is married to a citizen of the Philippine Common-

[59] United States District Court, Western District of Washington, No. 498, Oral Opinion, Wednesday, Apr. 15, 1942. In the matter of the Petition of Mary Asaba Ventura and Husband for a Writ of Habeas Corpus. Printed in *Tolan Committee Report*, May, 1942, pp. 44-48.

wealth. On the matter of dual citizenship Judge Black said in his opinion:

> "The petitioners allege that the wife 'has no dual citizenship,' that she is in no 'manner a citizen or subject of the Empire of Japan.' But how many in this court room doubt that in Tokyo they consider all the Japanese ancestry though born in the United States to be citizens or subjects of the Japanese Imperial Government?"[69]

These sentences contain a number of misconceptions.

Emigration from Japan was not legalized until 1885 and so no question of the status of the children of Japanese residing abroad arose until after that date. In fact, because of her political isolation, nationality laws were not codified by the Japanese until 1899. Since most of her trade and political contacts were with European powers at that time Japan borrowed the Continental *jus sanguinis* rule and provided that "A child is a Japanese if his or her father is a Japanese at the time of his or her birth." It happened, however, that most Japanese immigrants came to countries of the Western hemisphere (the United States, Brazil) in which citizenship is determined by birth on the soil of the nation *(jus soli)* regardless of ancestry. Consequently children born of Japanese immigrants in these countries were claimed by Japan on the basis of ancestry and by the country in which they were born in accordance with the *jus soli* rule. Under international law they were dual citizens, owing obedience to law and allegiance to either of these two countries within whose territory they actually were. To the vast majority

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[69] *Ibid.*, p. 47.

of young Americans of Japanese ancestry who did not intend to live in Japan or to exercise their Japanese citizenship, dual allegiance was a source of embarrassment, for it only called forth suspicion and misunderstanding in respect to them.

Consequently Japanese residents of the United States and Americans of Japanese ancestry began to petition the Japanese government to liberalize its nationality code and to make expatriation or single citizenship possible.[61] In 1916, in response to this pressure, the Japanese law was altered to make easier the expatriation of American-born dual citizens. But certain restrictions were retained in regard to males of military age, and the young Americans and their parents were not satisfied.[62]

Resolutions were passed and pleas and petitions were again forwarded to Japan.[63] By this time Japanese parents were already defying Japanese law which required them to register their children at a Japanese consulate. Buell reports that of 2,345 Japanese births in the State of Washington for 1915-1917, only 1,770 were registered with the Japanese consulate.[64]

By Imperial Ordinance No. 262 issued on November 15, 1924 and effective December 1, 1924 the Japanese residents and American citizens of Japanese ancestry gained their point. The Ordinance waived the *jus sanguinis* principle of the former nationality law in respect to chil-

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[61]The text of the most important of the petitions is found in K. K. Kawakami, *The Real Japanese Question*, The Macmillan Company, New York, 1921, p. 174.

[62]The details of law of 1916 are given in Yamato Ichihashi, *Japanese in the United States*, Stanford University Press, 1932, p. 323.

[63]K. K. Kawakami, *The Real Japanese Question*, pp. 186-87.

[64]R. L. Buell, "Some Legal Aspects of the Japanese Question," *American Journal of International Law*, Vol. XVII, January, 1923, p. 34.

dren born of Japanese nationals in the United States and certain other countries of the Western Hemisphere. The gist of the Ordinance and its Supplementary Provision is this. Children born of Japanese nationals in the United States and certain other countries lose Japanese citizenship *from birth* unless their parents or legal representatives register them at a Japanese consulate within 14 days of birth and unless the intention to retain Japanese citizenship is expressed at the time of the registration. Also, provision was made whereby those who were born before December 1, 1924 and who therefore automatically became dual citizens, could renounce their Japanese citizenship.[65]

The Japanese in America began to utilize the terms of this Ordinance at once. In 1930 Dr. E. K. Strong of Stanford University and his associates found, only six years after the change of law, that 40 percent of the citizens of Japanese ancestry seven years old and older who were living in California held American citizenship only. Since these were persons born *before* 1924, they could have reached that status only by definite renunciation of their Japanese citizenship. These figures and proportions are often unscrupulously used. There are writers and even lawyers who are not above using Dr. Strong's figures to "prove" that 60 percent of this group were dual citizens in 1930, and thus create an impression that approximately half of these American citizens are also citizens of Japan. They do not add that this really repre-

[65]The full translation of this and other Japanese Nationality Laws are found in Kiyo Sue Inui, *The Unsolved Problem of the Pacific*, Tokyo, 1927, pp. 300-20.

ents *a 40 percent reduction in six years* and that the downward trend has continued.[66]

Dr. Strong also found, in 1930, that of those American-born children who were from one to six years of age, two-thirds were American citizens only. In other words, they had not been registered at the consulate within the stipulated two week period and had never acquired Japanese citizenship. Dr. Strong found that the proportion of the unregistered constantly grew, and this tendency has continued.[67]

It has now been indisputably established that very few Americans of Japanese ancestry are dual citizens. In February of 1943 a registration was required of all persons of Japanese ancestry 17 years of age and over who were in War Relocation Centers. Citizens were asked whether their birth had ever been registered at a consulate for the purpose of establishing a claim to Japanese citizenship. A check on the reliability of the answers was possible because parents were also asked if they had ever so registered children. For male citizens, the questionnaire used was also a Selective Service System form, upon which it was plainly printed that any person falsifying or concealing a material fact is liable to a fine not to exceed $10,000 or ten year's imprisonment, or both.[67a]

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[66] E. K. Strong, *Japanese in California*, Stanford University Publications in Education-Psychology, Vol. 1, No. 2, 1933, pp. 46-47; E. K. Strong, *The Second-Generation Japanese Problem*, Stanford University Press, 1934, pp. 21-22; 142-43.

[67] *Idem.*

[67a] Aliens, citizen women 17 years of age and over, and citizen males above military age filled out form WRA-126, Rev., War Relocation Authority Application For Leave Clearance. Male citizens of military age filled out DSS Form 304A, Selective Service System: Statement of United States Citizens of Japanese Ancestry.

We give herewith the results of the registration at the Manzanar Relocation Center, as an example. This is an excellent Center to use, for it is likely that there is as great or greater a proportion of dual citizens of Japanese descent at Manzanar as there is at any other place. Manzanar houses the people of Terminal Island, who were one of the most isolated of the Japanese groups. It has also drawn its residents from "Little Tokyo" in Los Angeles where as much social solidarity as exists would be evidenced. Yet of the 3,541 citizens who registered, only 852 or 24 percent were dual citizens. The percentages for men and women were about the same. This does not mean that 24 per cent of the American citizens of Manzanar are also dual citizens. As Dr. Strong and others have pointed out, there has been less and less tendency for parents to register their children as time has gone on. Citizen parents practically never register their children. As a matter of fact, unless they themselves are dual citizens, they have no legal right to do so. A spot-check at the same Center of 600 citizens who were under 17 years old and therefore too young to register, revealed only a sprinkling of dual citizens. Since a large proportion of the citizens are 17 years of age or younger, this survey indicates that not more than ten to fifteen percent of Americans of Japanese ancestry are dual citizens.[68] In other words, as a result of their own efforts, the Japanese in this country have reduced the number of dual citizens by 85 percent and have eliminated any "problem" which may be associated with the subject except as it exists in the minds of uninformed and unreasonable men. That

[68]Report on Registration from Manzanar Relocation Center to Dillon S. Myers, National Director, War Relocation Authority, 1943.

General DeWitt based his argument of "military necessity" so substantially upon the subject of dual citizenship, reveals the weakness of the "military necessity" formula and its fictional character.

The Japanese in America have sought to eliminate what little dual citizenship yet exists. Japanese law requires the presentation of a birth certificate before expatriation is permitted. Many who were born some time ago, or in rural regions where few legal formalities were observed, cannot meet this requirement. Therefore, before the war began, Americans of Japanese ancestry born before December, 1924 were requesting the Japanese Government to simplify the expatriation process still further.[69]

This summary indicates how wide of the mark is the common belief that the Japanese government claims all Americans of Japanese ancestry. Obviously if this were true, Japan would not have provided a specific means by which these individuals could avoid the acquisition of Japanese citizenship or could renounce it if they had acquired it. That Japan expects nothing of Americans of Japanese ancestry was expressed as late as March 1941 by Yosuke Matsuoka, Japan's foreign minister, who said:

> "Your place is with your country, the United States of America. If the time ever comes that you must serve her to the utmost against the country of your ancestors, your duty is plain—you are American, regardless of whether in your mind, you are accepted as such and regardless of blood ties."[70]

It is important to establish the true facts concerning dual citizenship, for misinformation and misunderstand-

[69] *The Japanese-American Review*, New York City, January 25, 1941.
[70] *Ibid*, March 22, 1941.

ing on this question were a very real part of the "military necessity" by which evacuation is justified. On February 6, 1942, in response to the clamor on the part of a committee of West Coast congressmen over alleged dual citizenship of Americans of Japanese ancestry the Department of Justice and the War Department issued a joint statement which included the following sentences:

> "The government is fully aware of the problem presented by dual nationalities, *particularly among the Japanese* (emphasis our). The appropriate government agencies are now dealing with the problem."[71]

Precisely why the Departments of War and Justice should have been so much concerned over the meager amount of dual citizenship which those of Japanese ancestry retain, when Germans and Italians provide so much more fertile a field in this regard, is hard to imagine.

The German nationality code conforms to the *jus sanguinis* rule. It asserts that the child of a German acquires by birth the citizenship of the father. Therefore the American-born children of alien German males are all dual citizens, and there are hundreds of thousands of them. Moreover the children of hundreds of thousands of German immigrants who died without naturalizing are likewise dual citizens.[72] In addition, Section 25 of the German code provides that German citizenship is not lost by one who before acquiring foreign citizenship has secured on application the written consent of the competent

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[71] *A Week of the War*, Office of Facts and Figures, February 6, 1942.

[72] Richard W. L. Flournoy and Manley C. Hudson, *Collection of Nationality Laws*, 1929, pp. 309-12.

authorities of his home state to retain his citizenship."[73] Thus even naturalized American citizens of German background may be dual citizens. How many have made use of this provision it is difficult to say, but under the pressure of Nazi propaganda, it may be assumed that the number is considerable. And there are other means of retaining German citizenship abroad.

Italian law is even more ingenious in the creation of dual citizens. Again the *jus sanguinis* rule which Americans of Japanese ancestry induced the Japanese government to abandon in regard to them is present, for Article I of the Italian code reads: "One is a citizen by birth: (1) When his or her father is a citizen." In addition another article stipulates, ". . . an Italian citizen born and residing in a foreign nation, which considers him to be a citizen of its own by birth, still retains Italian citizenship, but he may abandon it when he becomes of age or emancipated."[74] Thus every child of an alien Italian male is a dual citizen and remains one unless, at the proper time, he takes steps to extinguish his Italian citizenship. It would be interesting to know if many have taken this step. There are nearly three-quarters of a million Italian aliens in this country.[75] Many of them have large families. It is safe to say that there are well over a million dual citizens of Italian ancestry, and that many thousands of them live on the West Coast.

There is one other interesting aspect of Italian nationality law. Persons of Italian descent who have become American citizens through naturalization or as a result

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[73] *Ibid.*, p. 312.

[74] *Ibid.*, pp. 363-64

[75] *Tolan Committee Report*, May, 1942, p. 230.

of expatriation from their former citizenship are subject to military call by Italy. On this point the law states. "The loss of citizenship . . . does not exempt one from the obligations of military service. . . ."[76]

The conclusion is obvious and unavoidable. No persons of foreign background have won so complete a legal and political emancipation from the land of their parents than have the Americans of Japanese ancestry. That *they* have been the ones singled out for evacuation on the grounds of dual citizenship would be amusing if it were not so tragic. And it is an ominous symptom of our sick times; one that slogans will not cure. If truth will not safeguard a minority group at a time of crisis, there is no "freedom from fear."

It is of particular importance to have a clear understanding on the subject of dual citizenship for it is a topic which entered significantly into the *Hirabayashi* decision. There this Court said:

> "Congress and the Executive, including the military commander, could have attributed special significance, in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship. Children born in the United States of Japanese alien parents and especially those children born before December 1, 1924, are under many circumstances deemed, by Japanese law, to be citizens of Japan. No official census of those whom Japan regards as having thus retained Japanese citizenship is available, but there is ground for the belief that the number is large."[77]

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[76] Flournoy and Hudson, *Collection of Nationality Laws*, 1929, p. 364.

[77] *Hirabayashi v. United States*, 320 U. S. 81, pp. 97-98.

In support of its contention that there is very likely a large number of dual citizens of Japanese ancestry, this Court included in a footnote, the figures which led it to such a view:

> "Statistics released in 1927 by the Consul General of Japan at San Francisco asserted that over 51,000 of the approximately 63,000 American-born persons of Japanese parentage then in the western part of the United States held Japanese citizenship. Mears, *Resident Orientals on the American Pacific Coast*, pp. 107-08, 429. A census conducted under the auspices of the Japanese government in 1930 asserted that approximately 47% of American-born persons of Japanese parentage in California held dual citizenship. Strong, *The Second Generation Japanese Problem* (1934), p. 142."[78]

In the beginning of this section we have corrected these figures, or at least brought them up to date, but we do not agree that these data which this Court used gave "ground for the belief that the number is large." On the contrary it seems obvious to us that the true picture which we have presented could have been anticipated from these very statistics. Fifty-one thousand is 80 percent of 63,000. In 1927, therefore, only three years after the 1924 Ordinance, 20 percent of the American-born of Japanese parentage had renounced or had failed to acquire Japanese citizenship. According to the very statistics to which this Court pointed, three years later, in 1930, the number of dual citizens had shrunk by 33 percent more, to 47 percent of the American-born. If 53 percent of the American-born lost or failed to acquire dual citizenship in the six years from 1924 to 1930, and if the pace of the reduction of dual citizenship was an accelerated one, there is no reason why the military com-

[78] *Ibid.*, p. 98.

mander or this Court should have reasonably supposed that, after twelve more years, the number of dual citizens would be large. We are forced to assume that, in an effort to refrain from annulling a military order, in time of war, this Court did not apply the standards of mathematics, logic and criticism to the Government's claims.

We call attention, moreover, to the curious phrasing of the Court's reference to "the maintenance by Japan of its system of dual citizenship." This is, unfortunately, the type of language used by the West Coast race-baiters, who try to imply that there is something different and sinister about the Japanese nationality law and concept of citizenship. Certainly this Court must know that no country, not excepting Japan, has "a system of dual citizenship." The nationality laws of each country recognize but one citizenship, its own, at least within its own boundaries. Dual citizenship exists under international, not national law, and arises because of the conflict of nationality codes.[79] Certainly the United States does not have any "system of dual citizenship," but its nationality code, too, in so far as it conflicts with others, can be said to "create" dual citizens. The United States claims as citizens children of its nationals, even though these children are born abroad.[79a] If these children are born in countries, which

[79]For a discussion of dual citizens and of the circumstances under which many countries claim as nationals persons who are also citizens of the United States see: Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, 1927, pp. 19, 544-90; Richard W. Flournoy, "Dual Nationality and Election," *Yale Law Journal*, April, 1921, Vol. XXX, No. 6, p. 545; Richard W. Flournoy, "Revision of the Nationality Law of the United States," *American Journal of International Law*, Vol. XXXIV, 1940, pp. 43-44; C. C. Hyde, *International Law, Chiefly as Interpreted by the United States*, 1922, pp. 667-69; John Bassett Moore, *A Digest of International Law*, 1906, pp. 518-717. Note that Moore's 200 page recital of friction between our government and others over dual citizenship claims and conflicts of nationality laws contains references to nearly every country of the globe *with the exception of Japan*.

[79a]Nationality Act of 1940, Chapter II, Sec. 201 (a), (d), (e), (g), in *Naturalization Laws*, Compiled by Elmer A. Lewis, United States Government Printing Office, Washington, 1942, pp. 113-14.

like our own, also regard as citizens those born on its soil, dual citizens have been brought into being. As a result of the conflict of nationality codes most of the American-born children of Frenchmen, the Swiss, Russians, Turks and as we have already pointed out, Germans and Italians, are, among others, dual citizens. The principal difference between the policies of these countries and Japan in respect to this issue is that for years our State Department, without result, has been trying to reduce the area of conflict by bilateral agreements with them or by inducing them to pass provisions such as the Japanese Ordinance of 1924. This country has many legitimate charges and complaints against Japan. But in the heat of conflict let us not *invent* some where they are least likely to exist, and then use these inventions as a basis for discrimination against hapless American citizens. The truth is that few countries have released children born of nationals living abroad as freely and completely as has Japan. After a careful review of the facts the Solicitor of the War Relocation Authority has written in a formal opinion:

> "There seems to be a popular impression that 'dual citizenship' of Nisei is a 'Japanese doctrine.' This is far from the truth. In fact dual citizenship may arise whenever different countries apply different tests of citizenship . . . . the Japanese policy as evidenced in the legislation of 1924 has not been an aggressive adherence to the principles of citizenship by descent, but, on the contrary, has represented an apparent attempt to conform to conditions in this country by requiring prompt action on the part of parents wishing to preserve the Japanese citizenship of the Nisei."[79b]

[79b] Philip M. Glick to the Director of the War Relocation Authority, "Dual Citizenship," Opinion No. 55, March 26, 1943, pp. 1, 6.

4. Japanese Language Schools Were Neither Unique nor Subversive and Their Graduates Have Served America Loyally in the Present Crisis.

It has been charged or intimated that the supplementary schools for the teaching of the Japanese language were creations and instruments of Imperial Japan for the dissemination of Japanese national ideals among the American-born. This, too, has been one of the building blocks of the "military necessity" edifice. And it is a fragile support at best for this ponderous structure. No one, as far as we know, has yet advanced anything even faintly resembling evidence to prove that the language schools carried on improper activities.

The "testimony" against the language schools, as in the instances referred by this Court in the *Hirabayashi* case,[790] is usually a mention of their numbers and an unsubstantiated and repetitious contention that dubious practices were being carried on in them.

On the other hand, every impartial investigation—and there have been several of them—has demonstrated that the schools were performing only the functions for which they were designed. Therefore, when this Court stated in the *Hirabayashi* decision: "Some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan,"[791] it was accepting without question gossip which originates in West Coast anti-Oriental circles and was ignoring serious and trustworthy inquiries which tell quite another story.

The facts are these. The first Japanese language school was established in 1896 by a Christian minister in con-

[790] *Hirabayashi v. United States*, p. 97.

[791] *Idem.*

nection with religious work.[80] It followed the pattern of German, Chinese and Portuguese language schools which had already been established.[81]

Under a grant made by the Carnegie Corporation to Stanford University, Professor Reginald Bell conducted a rigorous investigation of West Coast language schools. Dr. Bell found that in 1921 California added to her school law, under Section 1534 of the Political Code of California, a section dealing with foreign-language schools. This law placed the schools under the Department of Public Instruction of the State of California. It established standards of education and patriotism which teachers had to meet before they might practice their profession. For instance, the language school teachers were required to be conversant with English as well as Japanese and had to pass an examination in American History. Textbooks were regulated and hours of study were controlled. On May 4, 1927, on the basis of the results of a test case relating to a similar bill elsewhere,[82] California Attorney General U. S. Webb ruled that the California law was invalid. It is interesting that in ruling against state control of language schools this Court cited a case pertaining to a German language school (*Meyer v. Nebraska*, 262 U. S. 390), concerning which it had been ruled:

> "evidently the Legislature has attempted to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control their own. . . ."

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[80]H. G. Colket, "Suppressing Japanese Schools in Hawaii," *The Nation*, November 22, 1922.

[81]Ralph Kuykendall and Herbert E. Gregory, *A History of Hawaii*, Macmillan Company, 1933, p. 327.

[82]*Farrington, Governor, et al. v. T. T. Tokushige et al.* (decided February 21, 1927).

Thus from 1921 to 1927 the Japanese language schools of California were under the supervision and control of the State of California. If they were subversive, it was because the Department of Public Instruction of California was subversive. Dr. Bell found that although legal requirements were waived after 1927 as a result of the court decision, the local language school boards in most instances voluntarily retained the standards and requirements which had been set. He found that the approved textbooks were being used and that constant revisions to introduce materials pertinent to the American scene were being made.[83]

Another intensive study of the Japanese language schools was made by Svensrud.[84] She found that the schools were regarded by the students as distinctly supplementary, that the essential purpose was to establish a common medium of communication between the first generation and the second, and that the schools "are serving the same purpose as once did the German and Scandinavian language schools, which have died out during the last few generations."

Because of the dark hints which emanate from some quarters, what Svensrud established concerning subject matter taught and textbooks used is worth quoting:

> "The strongest objection which has been raised in this country towards the language schools of the Japanese has been that they foster anti-American ideas. This accusation is without basis. A thorough study has been made of all the textbooks to eradicate such possibilities."

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[83]Reginald Bell, *Public School Education of Second Generation Japanese in California*, Stanford University Press, 1935, pp. 23-25.

[84]Marian Svensrud, "Attitude of the Japanese Toward Their Language Schools," *Sociology and Social Research*, January-February, 1933, pp. 259-64.

Smith,[85] Strong,[86] Palmer,[87] Mears,[88] Millis,[89] and all other competent and acknowledged students of the subject have offered like testimony. Palmer reminds us:

> "Similar schools have been conducted by the Chinese; and also by the Germans and many other nationalities in the fornr of parochial schools. The Japanese schools are merely supplementary to the public schools and not a substitute for them as are parochial schools."

Millis, a noted investigator and research man who conducted a thorough study, asserts:

> ". . . these schools are not intended to perpetuate the traditions and moral concepts of Japan. They are supplementary schools, and at the worst there is much less in them to be adversely criticized than in the parochial schools attended by so many children of South and East European immigrants."

As a matter of fact the only trained investigator to adversely criticize the Japanese language schools has been the Japanese scholar and historian, Y. Ichihashi, who has argued that the time available to young Americans for supplementary language study is so inadequate for the mastery of a difficult language that it is a waste of their time and of their parents' money to maintain the schools.[90]

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[85]W. C. Smith, *Americans in the Making*, Appleton-Century, 1939, p. 302; W. C. Smith, *Americans in Progress*, Edwards Bros. Inc., Ann Arbor, Michigan, 1937, p. 164.

[86]E. K. Strong, *The Second-Generation Japanese Problem*, pp. 6, 201, 206.

[87]Albert W. Palmer, *Orientals in American Life*, Friendship Press, New York, 1934, p. 54.

[88]E. G. Mears, *Resident Orientals on the Pacific Coast*, Chicago, 1927, p. 358.

[89]H. A. Millis, *The Japanese Problem in the United States*, 1932, p. 265.

[90]Y. Ichihashi, *The Japanese in the United States*, 1932, pp. 329-33.

Moreover, one would suppose that the War Department and the United States Government would be somewhat embarrassed in raising the language school issue at this time. American citizens had scarcely been evacuated and placed in detention, partly on the grounds that they had been subverted in language schools; when the frantic call went out for bi-lingual interpreters, instructors for Army and Navy Japanese language schools, and persons to man listening posts and to aid in intelligence work. The lists of graduates of the Japanese language schools were combed and are still being combed to find suitable candidates. A call for "hundreds of instructors" in the Japanese language went out as early as March 4, 1942, and young Americans of Japanese ancestry were urged by the Japanese language papers to respond.[91] In August, 1942, representatives of the Navy's Japanese Language Schools were in the Centers to recruit patriotic Americans from behind barbed wire.[92] In January, 1943, sixteen young American citizens of Japanese ancestry enlisted in the Army from the Minidoka Relocation Center in order to enter the language school at Camp Savage, Minnesota.[93] Similar enlistments have several times occurred in all the Centers, and the brilliant and devoted services of these young people, at home and abroad, have been repeatedly praised by our military leaders. Much of the effectiveness of these programs was made possible by the existence of the Japanese language schools. The fact that large

[91] *California Daily News* (*Kashu Mainichi*), March 4, 1942.

[92] *Pacific Citizen*, August 13, 1942.

[93] *Pacific Citizen*, January 14, 1943.

numbers of these language school students have served America loyally against Japan *is the irrefutable proof that the schools did not teach allegiance to Nippon.*

The utilization of the existence of Japanese language schools as an argument for removal serves as an excellent example of discriminatory and selective thinking, for it is well known that there were forty-seven Italian language schools on the Coast, too, some of them with large enrollments. In San Francisco alone, for instance, there were four such Italian language schools.[94]

5. The Religious Views of Resident Japanese and Americans of Japanese Ancestry Constituted No Danger to Internal Security and Provided No Legitimate Reason for Evacuation.

Another of the frail props of the "military necessity" argument was that the Japanese in this country are "Emperor worshippers" or Shintoists and therefore have an emotional and fanatical interest in a Japanese victory.

Shintoism or shrine worship is the worship in Japan of local gods associated with the harvest, health, abundance, etc., or the shrines that are sacred to them.

State Shinto, by which expansionists and militarists sought to solidify the whole nation in terms of common symbols, is the nation-wide reverence of those shrines and dieties particularly associated with the royal family. But State Shintoism is a recent phenomenon and the Japa-

[94] *Los Angeles Times*, December 5, 6, 1941.

nese in America are long-time residents. The immigrants to America were untouched by this movement and were not cordial to its introduction.

It is a sad commentary on the degree to which unreason ruled that at the very time the people of Japanese ancestry were being evicted because of their alleged Shinto connections, thousands of them were attempting to carry on their Christian services and devotions. We reproduce, without further comment, the column "Church Activities Tomorrow," which appeared February 21, 1942 on the same page of the English Section of *The California Daily News* (Kashu Mainichi) that carried the text of the Executive Order which authorized the evacuation:

Methodist Church

3500 S. Normandie Ave.

9:30 a.m.—Sunday church school. Special classes for upper Jr. High and Sr. High.

10:30 a.m.—English service. Sermon, "Winning Souls Christ."

11:00 a.m.—Japanese service.

11:30 a.m.—John Wesley League meeting. Kenneth Ozeki, devotional chairman.

1:30 p.m.—Fellowship Circle.

West L. A. Community

1913 S. Purdue Ave.

6:30 a.m.—Prayer Circle.

9:00 a.m.—Sunday school.

10:15 a.m.—English service. Conducted by Rev. Nicholson.

11:00 a.m.—Japanese service. Sermon, "An Unanswered Prayer," Rev. J. Fujimori.

Christian Church

820 East 20th St.

9:30 a.m.—Sunday school teachers' prayer circle.

9:45 a.m.—Sunday school; High school forum; College of life.

11:00 a.m.—Worship service. Japanese sermon, "Run the Race With Patience," Rev. Unoura. English sermon, "Pride and Prejudice," Rev. Fertig.

Baptist Church

E. 2d and Evergreen

6:30 a.m.—Nisei Friends of Jesus Prayer Circle for all denominations Rev. Morikawa, speaker.

9:30 a.m.—Sunday school for all ages.

11:00 a.m.—Worship service.

2:30 p.m.—Intermediate B. Y. P. U. Meeting.

Hollywood Presbyterain

4011 Clinton Street

9:30 a.m.—Sunday school.

10:30 a.m.—Junior church.

10:45 a.m.—English and Japanese worship service.

5:00 p.m.—Christian Endeavor meeting.

Free Methodist Church

210 S. Chicago St.

9:15 a.m.—Sunday school.

10:30 a.m.—Y. P. worship service.

11:30 a.m.—Adult worship service.

7:00 p.m.—Nisei Church evening service. Victor Fujiu, Speaker.

St. Mary's Church

961 S. Mariposa Ave.

7:30 a.m.—Holy communion in English.

9:30 a.m.—Primary school.

10:30 a.m.—English service. Sermon, "Christ in Gethsemane," Rev. J. H. M. Yamazaki.

Fortunately it is no longer necessary to debate whether persons of Japanese ancestry are Shintoists or not. After a long and detailed study the Community Analysis Section of the War Relocation Authority has issued a report in which it is revealed that exactly .4 percent of the people of Japanese ancestry in the ten Relocation Centers are followers of the Shinto Faith.[95] And, of course, the interest of most of these is in sect and not in state Shinto. This study, moreover, indicates that of the Buddhists, most belong to the Shin and Zen sects, groups which have a record of resistance to state Shintoism in Japan.[96]

It becomes increasingly evident, therefore, that those who shouted about Shintoism and those who were responsive to the clamor had no idea whatever of what they were talking about. This is simply another instance of traditional Know-Nothingism, with a new label and a new victim. Instead of the Catholic who cannot be a good citizen because of his religion, it is the Japanese-American, and instead of the Pope it is the Mikado to whom allegiance is allegedly rendered. No word of condemnation is too strong for this attempt to make religious affiliation a test of loyalty.

It is significant, too, that while the proponents of evacuation have been vowing to save "Christian civilization from Shintoists" the actual representatives of religious bodies in America have consistently opposed evacuation and detention. There is not a major religious denomination in America—Protestant, Catholic or Jewish which has not passed an eloquent resolution on this

[95] War Relocation Authority, Community Analysis Report No. 9, Washington, D. C., May 15, 1944, p. 7.

[96] *Ibid.*, pp. 3-4.

question. Recently the statements of twenty-two major religous bodies were brought together in one pamphlet under the title of *The Concern of the Church for Christian and Democratic Treatment of Japanese Americans.*[97] To read this booklet is to sense the disjunction in thinking that has grown up in this country between the Church and certain departments of our government.

6. The Kibei Were a Small Group Whose Members Could Have Been Easily Located and Controlled; Many of Them Are Patriotic Americans Who Have Performed Extraordinary War-Time Services for This Country.

One of the "proofs" of the ties with Japan which General DeWitt and his apologists constantly cite in explanation of their decision to evacuate all persons of Japanese ancestry, is the existence of a group of Americans of Japanese ancestry called kibei, "returned to America," who were educated in Japan. Fantastic figures and proportions relating to the kibei have been invented in order to justify evacuation. Let us therefore consider the facts as they are revealed in the study undertaken by the War Relocation Authority in 1942 and published January 28, 1944.[98]

Of Americans of Japanese ancestry 72.7 percent have never been in Japan, much less studied there. Another 14.4 percent, while they have visited Japan, have had no schooling in that country. In this group fall those who have taken short summer trips to the Orient or who have

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[97] *The Concern of the Church for Christian and Democratic Treatment of Japanese Americans*, published by The Committee on Resettlement of Japanese Americans, 297 Fourth Avenue, New York 10, New York, April, 1944.

[98] War Relocation Authority, Community Analysis Report No. 8, Japanese Americans Educated in Japan, Washington, D. C., January 28, 1944.

gone with family members for short periods to see sick or dying relatives for a last time. Only 12.2 percent have had three or more years of schooling in Japan.[99]

If American citizens of Japanese ancestry who are under twenty years of age are considered we find that 86.8 percent have never been in Japan. Another 11.1 percent, though they have had a glimpse of Japan, have had no schooling there. Only 1.8 percent of the citizens under twenty years of age have had three or more years of schooling in Japan and can by any stretch of the imagination be called kibei.[100] In other words, the practice of sending children to Japan for schooling had just about ceased, and over 98 percent of these young Americans could have been automatically and easily cleared of the blanket accusation leveled against them had hearings been held.

Nor does it follow that the 12.2 percent who have lived and studied in Japan for three years or more have all been subjected to Japanese nationalistic propaganda. Of those who fall in this category, 26.8 percent are forty years of age or older. Their education in Japan was received during the period before the seizure of power by the military, when rising liberalism was a force in Japan, particularly in education circles.[101]

The War Relocation study also proves that many kibei returned to America to avoid (this in the case of dual citizens) service in the Japanese army.[102] These individuals can hardly be considered Japanese patriots or per-

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[99] *Ibid.*, p. 3.

[100] *Idem*

[101] *Idem*, 6

[102] Japanese Americans Educated in Japan, p. 4

sons upon whom the Japanese government could or would count very strongly. Also, it should be remembered that many of kibei volunteered for the United States Army or were drafted. Many more have been sought, because of their special knowledge of Japan and the Japanese language, for posts in our Army and Navy, language schools and for strategic services of the most important and confidential type. The Armed Services have depended upon these people at crucial times and places, and the faith placed in them has never been betrayed. It ill becomes General DeWitt, as a representative of the Army, to vilify the kibei as a group or to use them as an instrument to justify his panicky and unnecessary banishment of all persons of Japanese ancestry from the West Coast.

It should be remembered, moreover, that real kibei are quite conspicuous and easily distinguished. If hearing boards had been established, which was the very least the authorities should have done, young people lately returned from Japan who cannot speak the English language well could have been thoroughly investigated without ruining the lives and fortunes of thousands of Americans who have had no ties of schooling or residence in Japan whatever.

Moreover, the War Relocation Authority study cited above indicates that many kibei, recoiling from the lack of freedom and the hardships suffered in Japan, became ardent American patriots upon their return to this country. In fact, the too ready assumption that a person who is sent from the United States to Japan for a few years will inevitably become pro-Japanese reveals much more about those who make the assumption than it does about those who have been in the foreign land. We suggest

that the willingness "to sell America short," the belief that those who have experienced conditions in both countries will inevitably favor Japan, betrays an unconscious distrust of democracy and a contempt for the dynamic molding power of our institutions which constitute a more serious threat to our security and unity than any which a small group of kibei could possibly present.

It is lamentable that this Court took so seriously, in the *Hirabayashi* case, the alarmist claims concerning the size and character of the kibei group.[103] There is no reason, on the basis of the evidence, to take for granted, as did General DeWitt, that this country cannot compete successfully for the loyalty and good-will of citizens who have also known life under the harsh conditions of totalitarianism.

7. The Reasons Given by General DeWitt for Exclusion Are Examined and No Military Necessity Is Found to Have Existed.

General DeWitt, in his explanation of evacuation, claims that he was forced to this course because individuals of Japanese ancestry and their organizations had carried on pro-Japanese activities along the coast.[104] He cites the sending of tinfoil and monetary contributions to Japan. What he does not explain, however, is that these activities took place *before* hostilities between the United States and Japan began and that they ceased, for the most part, when tension between these two countries became great. In other words all that General DeWitt is really asserting that some Japanese nationals in the United States sided

[103] *Hirabayashi v. United States*, p. 97.

with Japan against China *as long as the conflict was confined to these two powers.* The sentiments of these Japanese, it should be added, were shared by many Caucasians who did not wish to see trade relations with Japan disturbed or who naively believed that a strong and victorious Japan would impose peace on a troubled Orient. And General DeWitt does not give us the other face of the coin, the story of anti-fascist American Japanese who stood in picket lines to protest the shipment of scrap-iron to Japan—scrap-iron which was provided and sold to Japan by white Americans.[105]

The practice of punishing Japanese residents in America and Americans of Japanese ancestry *after* the start of hostilities with Japan for what was done *before* the United States was involved, is shabby business at best. It is well-known that great numbers of persons of German ancestry and Italian ancestry sympathized with the mother countries before the United States was precipitated into the war and they showed this sympathy in many concrete ways. When the United States went to war most of these people explained that as long as they considered the issue to be a contest between British Imperialism and the needs of Germany and Italy they admittedly sided with the latter countries, but they asserted that now that their adopted or native land, the United States of America, was attacked their loyalty was to this country without reservation. We accepted that these protestations of Germans and Italians and of their organizations were made in good faith and, unless there was some convincing evidence to

[105] See hearings before the Select Committee Investigating National De-

the contrary, in any individual case we assumed that the change of heart was genuine. The same fair and reasonable attitude should have been maintained toward people of Japanese ancestry. That it was not is an indication of prejudice based on ancestry. The people of Japanese ancestry, even those who supported Japan against China, made it abundantly clear, as we shall prove, that in case the United States entered a conflict, even against Japan, they would take their places unhesitatingly at the side of America. When the attack came, as we shall show, every Japanese organization and countless individuals indicated loyalty and determination to help in every conceivable way. That these pledges were disregarded and that the people who made them were spurned, is one of the great tragedies of our times. It was a vivid demonstration to the world that America, or at least those who were allowed to speak for her at a critical time, had no living faith in the democratic process and could think of nothing better to do than to fall back upon the Nazi method of dealing with people, on the basis of ancestry.

General DeWitt makes the blanket charge that all the Japanese organizations on the Pacific Coast were engaged in pro-Japanese activities. He offers no proof of this and he can offer no proof of it. The prefectural societies which he names simply brought together people who had come from the same districts of Japan for the purpose of socials and picnics. People who have come to California from Michigan, Iowa, and Ohio have formed clubs and meet for similar reasons without being threatened with internment. Most of the Japanese local "Associations" were simply groups of business men who combined the functions of the ordinary Chamber of Commerce with some social and benevolent interests.

Most of all was General DeWitt excited over the Butoku Kai.[108] This is a good example of the use of names and words to impress the uninformed, when an honest explanation of the history and background of those terms would rob them of their sting. Butoku Kai means "society for military virtue." The activities implied by the term are fencing (kendo), Jiujitsu (judo) and wresting (sumo). A Butoku Kai is therefore a club where these sports are practiced and taught. They are called by a term that means "military virtue" because they developed during feudal times and were the prerogative of the warrior class of that period. They have since become the pastime of all classes. Kendo, for example, had for years been a part of the athletic or physical educational curriculum of every Japanese high school, including Christian and missionary schools which have been unalterably opposed to militarism. It is no more related to militarism in modern Japan than the buttons on the sleeve of an American male are today connected with dueling. The name and the buttons have both outlived their original purpose. This is a very common social phenomenon; social scientists call it "culture lag."

After assuming the existence of subversive organizations among the people of Japanese ancestry on the West Coast, General DeWitt next insinuates that actual aid was given the enemy by members of this segment of the population. We use the word "insinuate" advisedly, for nothing but murky suspicion is advanced, and any actual charges are carefully avoided.

In justification of evacuation General DeWitt speaks of "the interception of unauthorized radio communica-

tions which had been identified as emanating from certain areas along the coast."[107] In the first place the truth of this assertion has been challenged by a high official of the Justice Department. The correspondent of the New York Times sent a special dispatch on February 14, 1942, which reads:

> "Walter Lippman, the columnist, was challenged today by Thomas C. Clark, enemy alien control coordinator for the Western Defense Command, to substantiate statements that the Pacific Coast was in imminent danger of attack and that communication was taking place along this shoreline between Japanese Navy units at sea and enemy agents on land."[108]

Even if we assume that General DeWitt was right and Mr. Clark was wrong and that what were heard were messages intended for the enemy, it is difficult to understand why General DeWitt should take it for granted that the messages were sent by West Coast residents of Japanese ancestry. After all, there were 100 other possible suspects for every person of Japanese ancestry who lived on the coast. It is a matter of record that the only radio operator on the West Coast caught sending wireless messages intended for the enemy was a 23 year old man of German descent named William A. Schuler. This man was arrested at his Palos Verdes, California home. On June 3, 1942, he was sentenced to a six year prison term by a Federal Judge.[109]

The next bit of circumstantial evidence which General DeWitt produces is that "for a period of several weeks

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[107] *Ibid.*, p. 4.

[108] *New York Times*, February 15, 1942.

[109] *Los Angeles Times*, June 4, 1942.

following December 7th, substantially every ship leaving a West Coast port was attacked by an enemy submarine. This seemed conclusively to point to the existence of hostile shore-to-ship (submarine) communication."[110]

This is remarkable reasoning indeed. It seems evident enough that any nation which begins an undeclared war by a surprise attack on a nation whose defenses are by no means complete will have sent submarines into its victim's waters and will be in a position to do considerable damage with those submarines until counter measures become effective. If these submarine attacks depended upon the cooperation of resident Japanese, why did they cease or greatly diminish three weeks after Pearl Harbor? The "Japanese" were still in their West Coast homes for a long time after that date. The first of the 108 exclusion orders did not go into effect until March 29, 1942. How can anyone seriously urge a submarine menace as a grounds for evacuation *after* the menace has been overcome? We suggest that enemy submarine attacks were brought under control when air patrols and other defenses were reinforced and that neither the attacks nor their elimination had anything whatever to do with the presence or absence of residents of Japanese ancestry on the coast. Since General DeWitt produces no evidence that communication with enemy submarines actually took place, it is a feat indeed for him to fix the ancestry of the person or persons who sent the hypothetical message!

If there is any doubt of the artificiality of the "military necessity" argument, this attempt to inflate the seriousness of the Japanese submarine campaign should remove it. Hanson W. Baldwin, after pointing out that in the winter

[110] *Final Report* of General DeWitt, p. 4.

and spring of 1942 "there seemed a likelihood that the German submarine might win the war" has this to say about the West Coast situation:

> "Fortunately, Japanese submarines have done comparatively little commerce raiding, and what they have done has been rather ineffective. There have been five or six 'scares' along the West Coast and for a time there was a small Japanese submarine concentration in the Gulf of Alaska, but none of it accomplished much.[111]

We now know why General DeWitt mentioned attacks on West Coast shipping but said nothing about actual losses or sinkings. Lately it has been revealed that 2,004,234 tons of cargo were sent to Hawaii from the West Coast in 1942 and 1943 *without a single ship loss.*[112] While this perfect record was being maintained in the Pacific a terrific toll was being taken in the Atlantic by enemy submarines. On December 7, 1942, the Associated Press announced that "in the year since the Japanese attacked Pearl Harbor 548 Allied and neutral merchant ships have been lost to Axis raiders in the Western Atlantic."[113] If the success of enemy submarines suggests that the residents of the adjoining seaboard are disloyal and that an evacuation is necessary it is obvious that the evacuation ordered by General DeWitt took place at the wrong end of the country.

But the "most striking illustrations" of the "successful communication of information to the enemy" General

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[111] Hanson W. Baldwin, "America at War," *Foreign Affairs*, January 1943, p. 200.

[112] *Los Angeles Daily News*, April 7, 1944.

[113] *Los Angeles Times*, December 7, 1942.

DeWitt finds in three enemy attacks on the West Coast.[114] He says, "On February 23, 1942, a hostile submarine shelled Goleta, near Santa Barbara, California, in an attempt to destroy vital oil installations there. On the preceding day the shore battery in position at this point had been withdrawn to be replaced by another." All accounts of this episode indicate that the submarine surfaced, fired a few salvos which caused no damage, hastily submerged and fled. This is hardly what might be expected from a commander who knew his ship was safe from American fire.

Next, General DeWitt informs us that "In the vicinity of Brookings (Mt. Emily), Oregon, an enemy submarine-based plane dropped incendiary bombs in an effort to start forest fires. At that time it was the only section of the Pacific Coast which could have been approached by enemy aircraft without interception by aircraft warning devices."[115] We call attention to the fact that General DeWitt, although he was quick to give the date of the Goleta incident, mentions no date for the Mt. Emily episode. The very ugly reason for this concealment of material evidence is that the Mt. Emily attack occurred on September 9, 1942.[116] By June 5, 1942 every person of Japanese ancestry had been moved from his home and was in detention behind barbed wire and under armed guard in the crowded Assembly Centers hastily prepared for them.[117] By September 9 many of these people had

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[114] *Final Report of General DeWitt*, pp. 18-19.

[115] *Ibid.*, p. 18.

[116] *Los Angeles Daily News*, September 15, 1942.

[117] *Release No. 1042 Wartime Civil Control Administration*, Western Defense Command and Fourth Army, San Francisco, California. Issued October 24, 1942, for release in the afternoon papers of Wednesday, October

been removed to the inland Relocation Centers. How persons who had been incarcerated since June 5 or before, knew of the existing imperfections of the aircraft warning system in a remote part of Oregon and transmitted this information to an enemy submarine on or about September 9, General DeWitt does not explain. It is not too much to say that the use in this context, without mention of date, of an event in which persons of Japanese ancestry from the mainland could not possibly be implicated, is an abuse of public trust. We draw a different and more logical conclusion from the Mt. Emily attack. If the enemy was aided in his attack upon the West Coast on September 9, 1942 it proves that any internal danger to the region came not from the American Japanese, but from people of other ancestries who had been left undisturbed.

Finally General DeWitt tells us that at Astoria, Oregon, "A hostile submarine surfaced and shelled shore batteries there from the only position at which a surfaced submarine could have approached the coast line close enough to shell a part of its coast defenses without being within range of the coastal batteries."[118] Again the date of this event is omitted, perhaps because it occurred June 20, 1942, fifteen days after the last person of Japanese ancestry who had lived on the West Coast was securely in detention.[119] All that needs be said is that if enemy submarines were receiving directions from the mainland on June 20 and September 9, 1942, General DeWitt himself, by his exclusion orders, has provided us with the proof that it was not persons of Japanese ancestry who were involved.

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[118] *Final Report* of General DeWitt, p. 18.

The claim that General DeWitt excluded all persons of Japanese ancestry because he decided that individuals among this group were helping the enemy, is still more astonishing in view of the identity of those who actually have been convicted of being agents of Japan. No people in the history of this nation have been investigated and scrutinized as thoroughly as have the Japanese before and since the beginning of the present conflict. Out of all of this has come *one* conviction of a person of Japanese ancestry for having unauthorized dealing with the Japanese government. In June, 1942, Tsutomu Obana was sentenced to a light term of from two to six months on a charge of violating the Foreign Agent's Registration Act. But there were mitigating circumstances, for in pronouncing sentence the court stated: "It is to be said for Obana that he did not play crookedly smart with his government. He was a dupe for Japanese government officials and sought to obtain full registration under the Foreign Agent's act but had been forbidden to do so."[120]

Against this we have a much different record of the pro-Japanese activities of persons of other nationality and ancestral backgrounds. On June 19, 1942, Dr. Otto Willumeit, chief of the Chicago division of the German-American bund, pleaded guilty to plotting to collect and transmit United States defense secrets to Germany and *Japan*. Dr. Willumeit told of a trip along the West Coast in October, 1941, in which he and other German leaders inspected and noted coastal defenses and military installations.[121] Willumeit, who testified for the Government

[120] *Ibid.*, June 11, 1942

[121] *Los Angeles Daily News*, June 20, 1942; *New York Times*, August 4

against the espionage ring of which he was a part, was sentenced to five years in prison on August 21, 1942.[122]

Gerhard Wilhelm Kunze, leader of the German-American bund, was sentenced to fifteen years in prison on the same day for obtaining military information for Germany and *Japan*. A witness described Kunze's West Coast activities of late 1941 in these words:

> "All along the road from Seattle to San Francisco Kunze pointed out weaknesses of American coast defense, good spots for possible landing parties and the distances between naval units. After we drove around the San Francisco docks Kunze took me out to the Sacramento River Dam and told me that a break in that dam would inundate 100 square miles of the country. While at San Francisco he held conversations that I could hear with several employees of aircraft factories."[123]

Testimony was also introduced to show that Kunze and the members of his "touring party" charted "harbor installations, naval dispositions, shipping points that were vulnerable and places of possible invasion." Kunze was said to have a "kaleidoscopic memory of the entire geographical, topographical, and mineralogical resources of the West Coast, its history, and its national and racial characteristics." Members of the party found that Kunze knew the West Coast so well that "he didn't even need a road map to get around during the entire trip." Somewhere along the West Coast the travelers stopped "to confer with a group of bund sympathizers." At San Diego "Kunze pointed out the fleet in the harbor, its

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[122] *Los Angeles Daily News*, August 22, 1942.

strength, the number of battleships stationed there."[124] After his tour Kunze disappeared into Mexico. The man who smuggled him into Mexico, Dr. Wolfgang Ebell, has since been convicted of operating an underground railroad for spies escaping to the country to the South.[125]

Without going into all the dreary details it may be stated that another German, Rev. Kurt E. B. Molzahn, was also convicted of obtaining secret military information along the West Coast for Japan.[126] This amiable clergyman was sentenced to ten years in prison. Evidently the expedition of the Germanic agents of Japan along the West Coast yielded results. A German alien arrested August 1, 1942, in New York City, by the Federal Bureau of Investigation had in his possession a photograph, taken in San Diego, California, of an American submarine tender, with ten submarines alongside.[127]

If General DeWitt believed that the Japanese military had too much information about the West Coast, he need not inevitably have suspected the resident farmer, student or small businessman of Japanese ancestry. He might conceivably have thought of Captain Fritz Wiedemann, former German Consul-General in San Francisco, acknowledged to have been the center of the German espionage ring of the West Coast from 1939 to July, 1941. When Captain Wiedemann was expelled from this country to Europe, he stayed there only briefly. In September he was in Argentina. *In October, 1941, he was in Tokyo.*[128]

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[124] *Los Angeles Daily News*, August 4, 1942.

[125] *Ibid.*, August 22, 1942.

[126] *Ibid.*, August 26, 1942.

[127] *New York Times*, August 2, 1942.

Nor did the "interest" of those of German background in Pacific matters stop with the West Coast. It now appears that the contracts for the building of the army aircraft warning system in Hawaii were given to a German alien, Hans Wilhelm Rohl, who was admittedly and loudly pro-Nazi. The work which should have been completed six months before Pearl Harbor, was only 37 per cent finished when the enemy struck. Herr Rohl, who had been a resident of the United States since 1913, made frantic attempts to become naturalized three months before the start of the war. A suit charging fraud has been filed in the name of the United States Government for $1,976,000 against the firm with which Rohl is connected. As a result of a recent Congressional investigation still more serious charges may be preferred.[129]

Moreover it has been revealed by the Office of War Information that the only person who signaled or tried to signal the Japanese attackers from Hawaii was a German spy named Bernard Julius Otto Kuehn. The statement of the Office of War Information relates that Kuehn was arrested on December 6, 1941, was found guilty of espionage on February 21, 1942, and was sentenced to be shot. On October 26, 1942, his sentence was commuted to fifty years at hard labor. Kuehn worked out and furnished the Japanese with an elaborate system of signals whereby he could transmit to the Japanese fleet the number and types of American ships at Pearl Harbor. In 1940 he had a dormer window constructed in his carefully placed house from which the signals might be flashed. Whether he actually did signal the Japanese before or

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[129] For details of the *Kohl* case see *Los Angeles Times*, April 25, 1944; *Honolulu Star Bulletin*, August 1, 2, 4, 5, 9, 1944.

during the attack has not yet been revealed by the War and Navy Departments.[130]

There is no mystery about the interest of Germany and Italy in a successful attack by the Japanese military on the United States. Japan entered the war, undoubtedly partly at the behest of her Axis partners, when American aid to Great Britain was becoming an important factor in the European theater. No doubt Germany hoped that the United States would be fully occupied by a Pacific attack and would have to abandon England to a fate prepared for her by the Nazis. It is a crude absurdity, which we do not believe for a moment General DeWitt really shares, to think that Germany and Italy did not have as much interest in stopping West Coast war production as did Japan. Over sixty per cent of the airplanes, to mention but one item, which were being used in the European theater against Germany and Italy, and which were hunting down German submarines in the Atlantic, were being manufactured in West Coast plants. The Consolidated Liberator, so consistently used in the Mediterranean, the Lockheed Hudson, the Douglas Boston which guarded London, the Vultee Vengeance which the RAF used so successfully as a divebomber,—these are only a few of the names that come to mind in this connection.[131] Mr. Kunze knew this. So did Mr. Kuehn and the others whom we have given dishonorable mention. Perhaps Nicholino Buonopane, 23-year-old electrician at North American Aircraft Corporation in Los Angeles, did also, for he confessed to the Federal Bureau of Investigation Agents on October 9, 1942, that he had slashed wires on the interphone system, the heating controls and the wires leading

[130] *Chicago Tribune*, June 15, 1943.

[131] *Los Angeles Daily News*, March 1, 1943.

to the fuel pressure gauges of B-25 bombers.[132] If General DeWitt did not know that this is a global war in which enemies were equally interested in both sides of the continent, the Germans and Italians did.

We ask this Court to take judicial notice of the degree to which German and Italian success depended on stopping or curtailing West Coast war production, and of the obvious interest of Germany and Italy in victories for Japan in the Pacific. We ask that judicial notice be taken of the number of instances in which the German and Italian concern was translated into espionage and subversive activity on the West Coast and in Hawaii. We emphasize this particularly because in the *Hirabayashi* case this factor was totally overlooked by this Court. In its opinion this Court said:

> "The fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular associations with Japan."[133]

And, a few lines further on, this Court states:

> ". . . in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."[134]

It seems to us, on the contrary, that in the present conflict just the opposite has proved to be the case. We do not allude merely to the evidence we have cited to show to what degree Japan was aided by non-Japanese elements in this country. We refer to the manner in which the

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[132] *Ibid.*, October 10, 1942.

[133] *Hirabayashi v. United States*, p. 101.

[134] *Idem.*

issues of this war and the alignments these issues have brought, have transcended and cross-cut ethnic lines. Japanese culture (its historical roots, food habits, religion, social organization, family structure, writing, etc.) is infinitely closer to Chinese culture than to American ways. But China has been fighting Japan much longer than we have. Russia and the United States, though their political and economic structures are far different, are allies today. Quisling is not a German. Yet he found no difficulty in temporizing with his "ethnic affiliations" and becoming a Nazi puppet. The men of Vichy were not Germans; they supposedly represented the culture of France. But they were able to overlook their "ethnic affiliations" and to collaborate with the enemy, some of them even before the German invasion.

We ask this Court, therefore, before it gives currency to vague hints concerning alleged "ethnic affiliations" between Americans of Japanese ancestry and the Japanese of Japan, to consider the substantial body of evidence which indicates that whatever aid and comfort Japan has obtained in this country has not come from persons of Japanese ancestry who have recalled an ethnic affiliation, but from white Americans and non-Japanese who have forgotten one. To cite only a few examples: On June 5, 1942, Frederick V. Williams and David W. Ryder of San Francisco were sentenced to four years in prison for acting as Japanese agents without complying with the Foreign Agents Registration Law.[135] On September 10, 1942, Igor Stepanoff, who was convicted of violating the Selective Training and Service Act, confessed in a San Francisco Federal Court that he had worked as an agent

[135] New York Times, June 6, 1942.

for the Japanese government.[136] Arthur Clifford Read was convicted of being an undeclared Japanese agent on January 28, 1944.[137] On August 14, 1944, Mrs. Velvalee Dickinson, a white woman, born, reared and educated in California, was sentenced to ten years in prison and fined $10,000 for her activities as a Japanese agent.[138] The Government charged that in coded letters, by way of Argentina, she sent information concerning naval activities along the West Coast before and after Pearl Harbor. In sentencing her Federal Judge Shackelford Miller, Jr., said, "You, as a natural-born citizen, having a university education and selling out to the Japanese, were certainly engaged in espionage."

Others, most of them native-born white Americans, who have been arrested on charges of espionage for Japan or for being unregistered agents of Japan are: John Farnsworth, Harry Thomas Thompson, Frederick Heizer Wright, John C. LeClair, Joseph Hilton Smyth, Walker Grey Matheson, Ralph Townsend and Mimo De Guzman.[139] In the light of these facts, we cannot concede that reasonable and realistic counter-measures against internal danger can or should be taken on the basis of what has been called "ethnic affiliations." Everything that we have learned about the clash of ideologies since the beginning of this struggle demonstrate that one cannot identify the Axis sympathizer by the color of his hair, the slant of his eyes, ~~or by his ancestry.~~ And, it is hardly necessary

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[136] *San Francisco Chronicle, Los Angeles Times, Los Angeles Daily News*, September 11, 1942.

[137] *Christian Science Monitor*, January 31, 1944.

[138] *New York Times*, July 29, 1944, and August 15, 1944; *San Francisco Chronicle*, August 15, 1944.

[139] Carey McWilliams, *What About Our Japanese-Americans*, Public Affairs Pamphlets, No. 91, 1944, p. 8.

to add, the revelation of the true identity of those who have worked for Japan in this country is a stinging refutation of General DeWitt gratuitous assumption that "Japanese" were necessarily responsible for any activities along the Coast which he thought were designed to help the foe. Since this is the principal reason advanced by General DeWitt for evacuation, the "necessity" which he saw becomes more strained and dubious as information accumulates.

8. The Many Effective Measures Applied by the Department of Justice Before Removal, Made Evacuation Unnecessary.

Throughout General DeWitt's explanation of why he ordered evacuation there runs an obvious attempt to give the impression that the conditions and activities to which he objected and which he uses to rationalize evacuation existed *up to and at* the time removal took place. Thus he tells us that evacuation was necessary because Japanese were living near defense installations.[140] But in his chapter on the need for Evacuation he does not explain how many zones and vital areas, *at the request of the War Department*, had long prior to the evacuation been declared prohibited to enemy aliens by the Attorney-General. General DeWitt makes much of the presence on the Coast of persons who had made contributions to Japanese causes during the Sino-Japanese War.[141] He does not tell us that the Federal Bureau of Investigation had full information relating to these gifts and to these people and that anyone who had ever sent a substantial gift of any kind

[140] *Final Report* of General DeWitt, pp. vii, 9-10.

[141] *Ibid.*, p. 12.

to Japan was interned long before evacuation. Much is said about organizations which General DeWitt claimed to see as focal points of pro-Japanese sentiment.[142] The fact is that the officers and leaders of every important Japanese organization (including some fairly innocuous ones) were interned or at the least thoroughly investigated at the very beginning of the conflict.

In short, General DeWitt justifies an action that he took at the end of March, 1942, on the basis of conditions which existed more than three months before and which had been corrected or markedly altered by the time he issued his orders. The question to be asked is not whether evacuation *would* have been reasonable if no wartime controls had been instituted, but whether it was necessary and reasonable in the face of the long series of safeguards to West Coast and national security which were established by the civil authorities *before* evacuation. We propose to prove that carefully planned, effective, and comprehensive measures for coping with sabotage, espionage and subversive activity were applied promptly on the West Coast at the outbreak of war (indeed, several of them predate Pearl Harbor) and that their nature and smooth operation made unnecessary and unreasonable the expensive and unconstitutional abridgment of citizenship rights that General DeWitt nevertheless ordered.

On June 28, 1940, President Roosevelt signed the Alien Registration Act.[143] The bill, occasioned by uneasiness due to approaching war clouds, called for detailed information concerning the characteristics of our alien popu-

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[142] *Ibid.*, pp. 11-13.

[143] Alan Cranston, "The Registration of Aliens," *Common Ground*, Autumn, 1940, pp. 82-85.

lation. Since Japanese immigrants are not permitted to naturalize, it provided the Department of Justice with valuable information relating to this entire group. Failure to register was punishable by a fine of $1,000.00 and six month's imprisonment. The same penalty plus possible deportation was imposed for making false statements.[144] The registration began August 27, 1940, and continued for four months. Each alien was asked how and when he entered the United States, the length of time he expected to stay, and whether he had had military or naval service or any criminal record. He was asked to list all organizations in which he held membership and to indicate it if they were related in any way to a foreign government.[145]

Tension between the United States and Japan mounted rapidly in the summer and fall of 1941. On October 21, 1941, twelve agents of the Federal Bureau of Investigation visited the offices of Japanese organizations and separately interrogated the presidents, executive secretaries and members of the executive committees of each.[146] The books and membership lists of the Japanese Chamber of Commerce and Central Japanese Association were seized and subsequently "almost a truckful" of records and papers were accumulated from various sources. Among other things it was discovered *that contributions to Japanese causes from Japanese in California had ceased by May, 1941*, when the President declared an unlimited emergency.[147]

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[144] *Ibid*., p. 82.

[145] *Ibid*., p. 84.

[146] *Los Angeles Times*, November 13, 1941.

Between October 21 and November 12, 1941, Federal Agents made repeated calls upon the headquarters of Japanese organizations and frequently questioned Japanese leaders. On November 13, 1941, Attorney-General Biddle revealed plans for the internment of "dangerous Japanese aliens" in the event of "friction with Japan." Those Japanese aliens loyal to the United States were promised fair treatment by the Attorney-General if they did not break any law.[148]

On November 28, 1941, W. A. Carmichael, district director of Los Angeles for immigration and naturalization, announced new immigration regulations which were to go into effect the following Monday. They were designed to keep an even closer check on aliens and particularly on alien fishermen. Under these regulations any alien leaving the United States was compelled to have in his possession a valid passport, an alien registration receipt and, if of draft age, a clearance certificate from his draft board.[149]

In a matter of hours after the attack on Pearl Harbor the Federal government had apprehended nearly 1,300 Japanese nationals. In announcing this speedy and decisive action Mr. Biddle declared:

> "The arrests were made in accordance with a plan of action made months ago after investigation of the persons concerned. . . . Every one of those taken into custody had been under observation for more than a year. . . ."[150]

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[148] *China Weekly Review*, November 22, 1941, p. 332; *Los Angeles Times*, November 13, 1941.

[149] *Los Angeles Times*, November 28, 1941.

[150] *New York Times*, December 11, 1941.

It is apparent that Mr. Biddle had put in operation a plan intended to provide maximum protection for the Pacific Coast and that he had good reason to believe that the Department of Justice had taken into custody the great majority of the persons whom he considered any threat whatever to internal security.

Next, Japanese, German and Italian aliens were notified to surrender, by January 5, 1942, all radio transmitters, short-wave radio sets, cameras, firearms, ammunition or signaling devices.[151]

Also, by Presidential proclamation, aliens were forbidden to change place of abode or occupation, to travel by plane or to use public conveyances. Japanese aliens were also warned against being found on any highway, waterway, railway, place or thing not open and accessible to the public generally.[152]

A full inquiry into the finances and property interests of every Japanese national was made also. The aliens who had been in continental United States at all times on and since June 17, 1940 (the assets of the others were frozen), were required to fill in Form TFR-300, listing all possessions totaling $1,000 or more, and to file it with the appropriate Federal Reserve Bank by January 15, 1942.[153]

On January 14, 1942, by Presidential proclamation, a new registration of all enemy aliens fourteen years of age and older was ordered. Of this move Attorney-General Biddle said:

> "We deem it essential . . . to obtain supplementary information about all German, Italian and

[151] *A Week of the War*, official publication of the Office of Facts and Figures, January 1, 1942; *Pacific Citizen*, San Francisco, January, 1942.

[152] *Pacific Citizen*, January, 1942.

[153] *Idem.*

Japanese non-citizens and provide them with identification certificates bearing their photographs."

The procedure was to have the alien fill out a detailed questionnaire or application and to present him with the Certificate only after a check had been made of the application and the applicant. Applications were accepted only from those who could show an alien registration receipt card and the Certificates were delivered through the mail to prevent any deception concerning addresses. An alien was required to carry the Certificate with its photograph, fingerprint and signature with him at all times, under penalty of internment.[154]

The idea that the Japanese community went on its way blissfully and undisturbed, with time, money, personnel and strength for subversive activity until General DeWitt decided upon evacuation seems absurd indeed when one of the best informed authorities on the subject describes what really occurred:

> "Some aliens, suspected of subversive activity, had long been under surveillance by agents of the Bureau, but most of those detained were taken up because their positions in business, in Japanese associations, or in Japanese communities, made them possible organizers and leaders of fifth-column activity. They were officers of powerful Japanese concerns like Nippon Yusen Kaisha, Mitsui, Mitsubishi, Yokohama Specie Bank, and Sumitomo Bank, or men who had held important positions in Japan, or Japanese newspaper correspondents, or top men in their communities, or men whose organization activities would not wash clean under Bureau scrutiny. . . ."

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154 *A Week of the War*, official publication of the Office of Facts and Figures, January 16, 1942; *Pacific Citizen*, Vol. XIV, No. 161, January 1942.

"The FBI's roundup of enemy aliens was but one phase of the process of tightening government control of the property and persons of Japanese. The machinery of the Treasury Department was put in motion to stop all business and financial transactions involving Japan. The Treasury Department's General License No. 68 was revoked. Under this, Japanese nationals continuously residing in the United States on or since June 17, 1940, had carried on business after the general freezing order of June 14, 1941. On December 7 Secretary Henry Morgenthau, Jr., issued Public Circular No. 8 under Executive Order No. 8389, which read: 'All general licenses, specific licenses, and authorizations of whatsoever character are hereby revoked in so far as they authorize, directly or indirectly, any transaction by, on behalf of, or for the benefit of, Japan or any national thereof.' Simultaneously, the FBI forbade travel by alien Japanese and Japanese-Americans alike.

"The impact of these orders upon the life of the Japanese community was severe. Those away from home for the weekend were unable to return. Employees could not draw their wages. Households were caught without funds to purchase food, and grocers were forbidden to provide food on credit. Truck gardeners and florists could not sell their produce. Insurance companies cancelled policies on automobiles owned by alien Japanese. . . . .

". . . . After the first roundup of enemy aliens by the FBI, Japanese-Americans were permitted to travel in their own automobiles and to use public carriers upon showing a birth certificate. Alien Japanese continued to be barred the use of public carriers. . . . "[155]

[155] John H. Oakie, "Japanese in the United States," *Far Eastern Survey*, January 26, 1942, p. 25; *Interpreter Releases*, Common Council for American Unity, New York City, Vol. XIX, No. 14, Series C: No. 8

Now occurred even more drastic restrictions. On January 29, 1942 came a terse announcement from Washington in which the Attorney-General revealed that, *on the recommendation of the War Department*, enemy aliens would be ousted from vital areas in San Francisco and Los Angeles. Mr. Biddle explained that "several thousand aliens, mostly Japanese," would be affected by this first order. Fourteen areas were included in this first ban.[156] Soon twenty-seven more such prohibited zones were announced. A day later sixty-seven other areas were declared prohibited zones and Lawrence E. Davies wrote in a special dispatch to the New York Times:

> "Thousands of enemy aliens living in areas adjacent to shipyards, docks, power plants and defense factories prepared today to find new homes as Attorney-General Biddle added sixty-nine more districts in California to the earlier list of West Coast sections barred to Japanese, Italian and German nationals. . . . The chief aim of the Department of Justice and the War Department appeared to be the protection of vital industrial and waterfront areas from potential fifth columnists."[157]

Hard on the heels of this came a new order declaring seven areas in the State of Washington and twenty-four in Oregon likewise prohibited to enemy aliens. The Grand Coulee and Bonneville dams were sites included in these evacuated zones.[158]

In twelve other California areas aliens were not evicted but curfew regulations were imposed. Then came a sweep

[156] *New York Times*, January 30, 1942.

[157] *A Week of the War*, January 30, 1942; *New York Times* (special

ing curfew order. Effective February 24, 1942 all enemy aliens in an area beginning 50 miles north of Los Angeles and running north for 500 miles to the Oregon border, were ordered, under penalty of internment, to be in their residences from 9 P. M. to 6 A. M. at all other times, to be at their homes or their places of employment, and in any case to remain within a five miles radius of their residences. The area involved ran inland from 30 to 150 miles along the Coast.[159]

Nor were the Japanese spared mass arrests of the most general kind. On February 2, 1942, fifty-five Federal Bureau of Investigation Agents, 78 detectives, 30 deputy sheriffs, 12 uniformed policemen, and a number of immigration officers descended upon Terminal Island. Under the authority of a blanket warrant they took into custody all the adult alien males, over five hundred in number, who had fished in West Coast waters. Their vocation was the only charge against most of these men and that was hardly grounds enough for holding them in internment. Accordingly most of them have since been released.[161]

The Attorney-General continued to issue evacuation and restriction orders. These were carefully planned to afford protection to defense plants and vital installations of all kinds. By an order of February 2, 1942, for instance, the area including the huge Santa Monica Douglas air plane plant was closed to those of enemy nationality.[162] On this same day many coast cities or large sections of them were

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[159] *Idem*

[160] *California Daily News (Kashu Mainichi)*, February 2, 1942; Gracia Booth, "You Can't Black Out the Stars," *Christian Century*, March 25, 1942, p. 384.

declared prohibited or restricted zones. Over 1,500 Japanese aliens were affected by the orders of February 2.[163] By February 9, eighteen Arizona zones had been added to those from which aliens were banned.[164]

On February 11, 1942, the measures which had been taken to ensure "West Coast Control" were reviewed in a joint release by the Secretary of War and the Attorney-General. Some of the significant passages of this important document read:

> "The Army has surveyed and recommended 86 prohibited areas in California. Further areas have been studied and are now being recommended in California, Washington, Oregon and other western states. . . . The areas include regions bordering on military installations, plants, plants engaged in war production, public works such as aqueducts, bridges, pipelines and wharfs, and coastal zones of strategic importance.
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> "The Secretary of War and Lieutenant General DeWitt, Commander of the Western Defense Command, have in addition recommended to the Attorney-General that 12 areas along the coast be restricted so that, in order to remain within the areas, all alien enemies must obtain permits which will be issued to them under regulations of the Department of Justice expressly limiting their persons and conduct therein. . . . The Secretary of War states that the Attorney-General has taken all steps recommended by the Secretary of War for the control of alien enemies on the West Coast to date.[165]

[163] *Ibid.*, February 5, 1942

As this statement indicates, the Department of Justice co-operated effectively and continuously with the War Department until General DeWitt demanded an unnecessary degree of personal power and promptly abused it. For instance, as a result of conferences between representatives of the Department of Justice and the War Department, a working agreement was outlined on January 6, 1942 in which the Attorney-General made greater concessions to the Army in respect to apprehension, search and seizure and multiple searches than has ever before been permitted in the history of this country.

The memorandum which embodies this agreement states that the Attorney-General will entertain Army recommendations concerning restricted areas.[166] By its terms FBI agents are instructed to entertain Army requests for apprehensions submitted in writing, or, if time does not permit, *to honor oral requests* to be confirmed later in writing.[167] An enemy alien found in violation of any proclamation is declared to be subject to arrest by FBI agents or by the Army *without warrant*. An enemy alien in possession of contraband is declared to be subject to arrest *without warrant*.[168] United States attorneys are instructed to furnish warrants authorizing the search of the premises of an enemy alien *merely on application*.[169] No grounds beyond the statement that the premises are those of an enemy alien is necessary. When time does not permit the procuring of a warrant it is agreed that the premises *may be searched without a warrant*.[170]

[166] *Final Report* of General DeWitt, pp. 4-6.
[167] *Ibid.*, p. 5.
[168] *Idem.*

Where the premises are those occupied by a citizen the agreement states that they can be searched only if a search warrant is obtained, but a provision is made whereby such a premise may be kept under surveillance while the warrant is being obtained.[171] A procedure for "spot raids," (the search of all alien enemy premises in a given area at once) is worked out.[172]

Moreover, all these provisions were put into execution promptly, and prohibitions and restrictions were strictly enforced. For instance, the February 15, 1942, deadline for aliens to be out of twelve Los Angeles zones was scarcely past before FBI agents were in the areas to make certain that no violators of the proclamation remained.[173] At the West Coast Tolan Congressional Committee Hearings it was revealed that Federal agents had combed airport districts for possible violators of exclusion orders too.[174]

That long-term planning, even to the creation of a special service, went into the measures and precautions which preceded General DeWitt's senseless break with constitutional procedure, were revealed by the Assistant to the Attorney-General in the summer of 1942 when he wrote

> "The Department of Justice began planning strong preventive programs ready for immediate action on the inevitable day of reckoning. As the interminable debate over America's foreign policy captured the headlines, planning quietly continued. At least a year

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[171] *Idem*

[172] *Idem*

[173] *California Daily News*, February 16, 1942

[174] *Hearings before the Select Committee Investigating National Defense Migration* (Tolan Committee), Part 29, San Francisco, Testimony of Tom

before Pearl Harbor the Department of Justice began to list possible saboteurs and enemy agents among the German, Italian, and Japanese alien populations. These lists were carefully compiled by Federal Bureau of Investigation agents and submitted for thorough review to a comparatively unknown division, at that time called the Special Defense Unit, whose chief function was the planning of vigorous counter-measures in the event of war."[175]

Accordingly it is exceedingly difficult to reconcile General DeWitt's "military necessity," which nothing less than total evacuation could satisfy, with the confidence of the Director of the Federal Bureau of Investigation that his unit had the situation under perfect control. On July 18, 1942, Director Hoover said:

> "The attack on Pearl Harbor found the FBI completely mobilized on a war-time basis and ready for any emergency. In the first twenty-four hours after the attack more than 1,000 of the most dangerous enemy aliens were rounded up."[176]

Director Hoover of the Federal Bureau of Investigation is a realistic man. His patriotism and good faith, too, must be assumed by this Court. If the task of preventing sabotage and subversive activity along the coast without the intervention of the Army had been too great for him, we must assume that he would have so stated. He has never done so. Attorney General Biddle, too, can be assumed to be more concerned for the safety and victory of this country than over his prerogatives. Yet all state-

[175] James Rowe, Jr., "Much Enemy Program So Far," *Common Ground*, Summer, 1942, p. 20.

[176] New York Times, July 19, 1942. (United Press release from Wash-

ments and reports that these men have issued declare that the precautions and counter-measures they applied were sufficient and successful.

Moreover, the record bears them out. Even *if there had been* sabotage attempts and evidences of fifth column activity among resident Japanese, it is not at all certain that evacuation would have been justified. We would need then to ask whether the Intelligence services could not have crushed individual subversive activity and espionage rings among West Coast Japanese as they did among Germans, Italians and native-born white Americans in various parts of the country without dislocation of populations and mass evacuations.

But the transfer of authority to the Army and the extension to citizens of controls which have hitherto been reserved for enemy aliens, occurred *in the total absence of any deterioration of the effectiveness of Department of Justice control.* There was no increase in sabotage attributable to persons of Japanese ancestry because no sabotage has ever been traced to a member of this group. There was no increase in fifth column activity because no such activity has been attributed to this group. On December 10, 1941, Attorney-General Biddle asserted, "There has been absolutely no evidence of fifth column or sabotage activities."[177] In the joint release issued February 11, 1942, by the Secretary of War and the Attorney-General on West Coast Control we are told, "To date there has been no substantial evidence of sabotage by any aliens."[178] Yet three days later General DeWitt was to request un-

[177] *Ibid.* December 11, 1941.

[178] *Los Angeles Japanese Daily News*, February 13, 1942.

limited authority to remove citizens as well as aliens from the zone under his command!

The enormities of evacuation would be most difficult to justify in any case. The question would always be whether more vigorous Department of Justice action within the constitutional framework would not have sufficed, or whether an alternative, such as the establishment of hearing boards, would not have been preferable. But in the absence of any evidence of sabotage or fifth column activity, in view of the amazing list of workable and effective measures and controls which were in existence before removal (117 prohibited zones and many restricted zones had been named before removal), evacuation is simply inexplicable, except on grounds of prejudice and unreason. There was never any convincing grounds for evacuation. But at the time it was actually undertaken, as we have demonstrated, there was less necessity or reason for it than at any time since the war began.

9. The Argument That Early Japanese Military Successes and Lack of Time Necessitated Removal and Prevented Hearings Answered.

In his explanation of evacuation General DeWitt constantly attempts to give the impression that he was working against the pressures of time. In one place he says of the people of Japanese ancestry, "Their loyalties were unknown and time was of the essence."[179] The General's thought seems to be that a man may be forgiven for violating the United States Constitution, if only he can prove that he was in a hurry. He provides us with a breathless account of early Japanese successes which would do credit

to the Tokyo radio. He recounts how Pearl Harbor was attacked December 7, how Manila fell January 2, how we suffered a naval reverse in the Java Sea on February 27, how Bataan was occupied on the 9th of April, how Corregidor surrendered May 6, and how Attu and Kiska were occupied on June 7.[180] There his recital stops and there, too, stop the Japanese victories. This Court has evidently been unduly impressed by this type of information and reasoning because in the Opinion of the Court in the Hirabayashi decision a similar account of the first phases of the war is offered to explain why a "reasonably prudent man" might, in view of the circumstances, impose a curfew upon citizens.[181]

The flaw in General DeWitt's reasoning, as far as evacuation is concerned, is that this method of safeguarding our western shore was not suggested by him or by others *when the danger was greatest.* The time when there was real cause for alarm on the West Coast was immediately after December 7, when it was not clear whether the attack on Pearl Harbor was a prelude to an invasion attempt on the Islands and a swift move across the Pacific to attack the Coast or whether the Japanese strategy was to cripple our fleet at Hawaii so that it could not interfere with Japanese movements in the South Pacific. Long before evacuation was seriously discussed we knew that Japan's major concern was the occupation of the territories more immediately within her grasp, and that she was not contemplating an excursion in force to American shores.

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[180] *Ibid.*, p. 18.

In this manner December, January, February and most of March passed without any attempt being made to set up hearing boards or to take any steps to avoid the mass evacuation of citizens. General DeWitt's Civilian Exclusion Order No. 1 was not issued until March 24, 1942, and did not become effective until March 30.[182] By that time he had discovered that "time was of the essence" and that a "hasty" evacuation was imperative.

It must not be supposed that because evacuation was *begun* at the end of March, that it was completed then. Thousands of persons of Japanese ancestry remained in their homes, on their farms and in their old locations for months after the removal started. The territory from which the people were to be excluded was divided into 108 zones and the inhabitants of Japanese ancestry were moved out of each of them in turn. The last Civilian Exclusion Order, No. 108, is dated July 22, 1942, and those whom it affected were given until noon of August 11, to comply with it.[183] It therefore appears that persons of Japanese ancestry were present in the "threatened" zone for a full eight months after the declaration of war, living and working under approximately the same regulations that the Attorney-General had prescribed before control passed to General DeWitt. The notion that evacuation and all its excesses must be excused because it was the product of haste born of military necessity is consequently seen to be a sorry fiction.

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[182]Civilian Exclusion Order No. 1. Issued from the Presidio of San Francisco, California, March 24, 1942, by Lieutenant General J. L. DeWitt. It includes all persons of Japanese ancestry from Bainbridge Island in the State of Washington.

[183]Civilian Exclusion Order No. 108. Issued from the Presidio of San Francisco, California, July 22, 1942, by Lieutenant General J. L. DeWitt.

Moreover, during the long period during which General DeWitt's exclusion orders were being promulgated and before all of them had even been written, the military picture brightened considerably for this country in the Pacific War. On June 6, 1942, the Japanese navy sustained a blow from which it never recovered. On June 18, Secretary of War Stimson released a statement through the Associated Press which should have meant a reconsideration and revision of the policy of evacuation if it was indeed based on military considerations relating to possible attacks on the West Coast. The first paragraph of the news release, from which its tenor may be inferred, describes the changed situation thus:

> "The danger of an immediate Japanese attack on the West Coast of the United States has greatly diminished, Secretary of War Stimson said today, because recent American successes scattered the enemy fleet 'all over the Pacific' and sent it 'hustling away as fast as it could in the opposite direction.' He was speaking primarily of the struggle off Midway, in which American air power wreaked such havoc on the Japanese navy."[184]

In an effort to leave the impression that danger to the coast necessitated the continuation of the evacuation policy and left no time for hearings or alternatives, General DeWitt has told us:

> ". . . with the occupation by the Japanese on June 7th of Attu and Kiska Islands, United States territory in continental Northern America had been invaded."[185]

[184] *Los Angeles Times*, June 19, 1942.

[185] *Final Report* of General DeWitt, p. 18.

Fortunately for our perspective and purposes an even higher ranking officer than General DeWitt has had something to say about this event. On August 12, 1944, at the Bremerton, Washington Puget Sound Navy Yard, the Commander-in-Chief of the American Army and Navy, the man who has participated to such an extensive degree in the overall planning of the campaigns against the Axis, uttered these words in the course of an historic address:

> "You here can well realize the commotion which followed the Japanese occupation of Attu and Kiska and you may have thought that the chiefs of staff in Washington were not paying enough attention to the threat against Alaska and the Coast. We realized, of course, that such a Japanese threat could become serious if it was unopposed, *but we know also that Japan did not have the naval and air power to carry this into effect without greater resources and a longer time to plan* (emphasis ours).
>
> "Preparations to throw the Japanese from their toe-holds had been laid even before the Japanese got there, and the rest of the story you know."[186]

We may reasonably ask why the episode becomes so enlarged and fearsome when General DeWitt tells it. The answer is plain. General DeWitt has little material with which to prove that the coast was in such great and immediate danger that evacuation was necessary, and he must make that little material do double and triple service. This is not the tactic of a man whose conscience is easy concerning the course he has taken. The General "doth protest too much."

[186] Text of President Roosevelt's address delivered August 12, 1944, at the Puget Sound Navy Yard, Associated Press release, [illegible]

This attempt to justify evacuation in the eyes of the country and of the world by insisting that the situation on the West Coast was so different from anything existing elsewhere that extreme measures taken nowhere else were reasonable here, leads General DeWitt and those who have followed him, not only to a distortion of the details of the Pacific phase of the struggle but also to a most peculiar appraisal of developments in the entire war. One would think, to read General DeWitt's account, that World War II was fought somewhere between San Diego, California, and San Francisco, and that the rest of the United States and the world learned about the dispute some years later!

General DeWitt's claim that he was forced to extraordinary measures because he was confronted with a military and internal situation without parallel elsewhere has been mercilessly analyzed and excoriated by Harrop A. Freeman, Professor of Constitutional Law and *Jurisprudence* of the College of William and Mary. In trenchant words Professor Freeman describes the actualities:

> "At the same time that we were girding ourselves for battle in the Pacific, Germany and Italy also declared war on the United States. Both these countries had experienced phenomenal military successes as even the briefest chronological history will recall. Italy had overrun Ethiopia and Albania; had invaded British African colonies, Egypt, and Greece; with the help of Germany had taken Crete and other Mediterranean islands and completed the conquest of Greece, thus challenging Britain's lifeline in the Mediterranean. Germany, rising from complete impotence in military matters in 1933, had occupied the Rhineland, annexed Austria, forced upon England and France the Munich appeasement, overrun Czecho-

slovakia, and devastated Poland in twenty-six days. She had occupied Denmark and invaded Norway, crushed the Netherlands in four days and Belgium in seventeen days; had annihilated the highly ranked French army and conquered France in ten days; had launched and maintained mass air raids on England consistently for nearly six months and had achieved a recognized superiority in the air over England. The Nazis had taken Rumania with her rich oil wells and Bulgaria and had moved to swift victories in Greece and Crete. Turning from England she had invaded Soviet Russia on a 2,000 mile front and had piled victory upon victory—Kiev, Odessa, Kharkov, the outskirts of Moscow, Rostov. All these were completed immediately prior to March, 1942; and she went on immediately to take Sevastopol, a large part of the Caucasus, and Stalingrad. Surely in early 1942 the Germans seemed invincible.

"Nor had the German efforts been limited to Europe. German armed ships and submarines had terrorized our Atlantic shipping and waters within 100 miles of our east coast. We recall a few of the better known examples: the raider *Deutschland* seized the S. S. *City of Flint*; the *Graf Spee* and the *Columbus* were scuttled off the American coast; the *Robin Adair* was sunk by Nazi submarines in the South Atlantic; the United States Destroyer *Kearny* was torpedoed off Iceland, and the destroyer *Reuben James* was torpedoed nearer our coast. The number and proximity to our coast of the sinkings became alarming by January, 1942. So complete was Germany's freedom of movement in our waters that a submarine shelled the oil refineries on Aruba, in the Caribbean, on February 16, 1942, and submarines were able to

land saboteurs and quantities of explosives at two points on our coast on June 13 and 17.

"In Africa, Rommel launched his successful drive in January, 1942, which carried him by June to almost complete control of North Africa. The Germans had large concentrations of planes, battleships, and submarines at bases nearer to New York than are Hawaii, Kiska, or Midway to the west coast. The roundup of two German spy and saboteur rings on the east coast was just being completed; the influence and size of the German-American Bund were being revealed and quantities of munitions in their possession were being seized. By comparison, our successes in the Pacific were considerably greater than those in the Atlantic; and Japan, unable to conquer China in seven years, was a less formidable foe than Germany with her record of conquest after conquest of the most difficult antagonists. Certainly there was no clearer 'military necessity' in the Pacific than there was in the Atlantic."[187]

Not only were military and naval developments as grave in the East as they were in the West at the time when General DeWitt launched his evacuation program, but the internal situation and the propaganda front were infinitely worse. There is no need to go into detail concerning the potential threat that a military commander might have seen in the German and Italian populations of the East Coast, but a few facts should be kept in mind.

In the Middle Atlantic States of New York, New Jersey and Pennsylvania alone there were, at the outbreak of

[187] Hatrop A. Freeman, "Genesis, Exodus, and Leviticus, Genesis, Evacuation, and Law," *Cornell Law Quarterly*, Vol. XXVIII, No. 4, June

war, 484,000 persons who were German-born and 169,000 of them were enemy aliens.[188] Most of them, it may be added, lived in or near seacoast cities. In the State of New York, for instance, 316,849 persons who had been born in Germany were living, and of these 128,735 were enemy aliens.[189] On June 12, 1943, the Census Bureau reported that there were 429,060 white persons of German "mother tongue" (*i.e.*, persons living in homes where German is the principal language spoken) in New York City.[190] Throughout the United States, but chiefly concentrated in the east, were 3,949,780 white persons of German "mother tongue," divided into 1,589,040 foreign-born, 2,436,777 native-born of foreign or mixed parentage, *and 925,040 native-born of native parentage.*[191] When the bogey of Japanese unassimilation is raised, these figures might be kept in mind.

If these hundreds of thousands of people had shown no interest in "the New Germany" or in Germany's military program, their mere numbers would have been of no importance; but there is general knowledge and a voluminous literature concerning the amount and effectiveness of Nazi propaganda in the United States.[192] The facts are so well

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[188] *Tolan Committee Report* of May, 1942, Table 2 (Foreign Born Germans and Italians in the United States by Divisions and States, 1940), pp. 229-30.

[189] *Idem.*

[190] *N. Y. York Times*, June 13, 1942 (Special dispatch from Washington, D. C.).

[191] *Idem.*

[192] For some conception of the degree to which this country was permeated by Nazi propaganda see Henry L. Stimson, Charles C. Burlingham, Nicholas Murray Butler, and others, *The German-Reich and Americans of German Origin*, New York, Oxford University Press, 1938; Robert Strausz-Hupé, *Axis America*, New York, George P. Putman's Sons, 1941.

known that we shall quote but one statement written by a distinguished student in a scholarly publication:

> "Gray-shirted O. D. or *Ordnungsdienst* men of German-American Bund managed a crowd of 20,000 people in Madison Square Garden at the Bund's 'Pro-America Rally' in 'honor' of Washington's Birthday, 1939. Fritz Kuhn, Bund Fuehrer, claimed before being sent to Sing Sing the next year that his organization had 20 summer camps, 71 local units spread over the country, and $900,000 annual revenue. News stories were telling of rallies at camps attended by 5,000 to 12,000 members and sympathizers, of Nazi bunting, and of goosestepping, Heil-Hitlering, O. D. troopers.
>
> "Of 178 German-language periodicals in the United States (including 13 dailies and 111 weeklies), all but a few gave favorable treatment to the Nazi regime, according to a survey made in the fall of 1940."[193]

The figures of foreign-born and alien Italians on the East Coast are even less reassuring. In the tiny seaboard states of New England there were over 230,000 persons who had been born in Italy and more than 106,000 of them were aliens.[194] The Italian-born population of the three Middle Atlantic States was 950,000, and the enemy aliens among them numbered 300,000.[195]

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[193] Alfred McClung Lee, "Subversive Individuals of 'Minority' Status," The Annals of the *American Academy of Political and Social Science*, Vol. CCXXIII, 1942, pp. 164-65.

[194] *Tolan Committee Report* of May, 1942 ("Foreign Born Germans and Italians in the United States, by Divisions and States, 1940), pp. 229-30.

[195] *Idem.*

These Italians too had been subjected to a barrage of Fascist propaganda and had not been entirely uninfluenced by it, as another excerpt from Lee indicates:

> "Late in 1938, the Reverend Leon M. Birkhead discovered that there were then at least eight hundred organizations in the United States that 'could be called pro-Fascist or pro-Nazi.' . . .
>
> ". . . Mr. Birkhead guessed that 'one voter in every three in the United States is being subjected to Fascist propaganda.'
>
> ". . . In 1940 the Mazzini Society estimated that 80 per cent of the 120 Italian-language publications in the United States were then Fascist, 10 per cent anti-Fascist, and the balance neutral."[196]

If, in the face of these statistics and these facts the military leader in charge of the Eastern Defense Command had reason to believe (and rightfully believed, as events have shown) that the Department of Justice and the Intelligence Services could successfully cope with any manifestations of disaffection on the part of these vast segments of our population, an opposite conclusion on the part of General DeWitt in respect to the relatively few persons of Japanese ancestry on the West Coast must be ascribed to personal rather than to professional reasoning.

If any further proof of this is needed, we have only to look at the Hawaiian example. General DeWitt actually seeks to explain the evacuation, concentration and detention of mainland persons of Japanese ancestry, in

[196] Alfred McClung Lee, *Op. cit.*, pp. 164-65.

terms of the success of the Pearl Harbor attack and the danger in which our Hawaiian stronghold stood.[197] *Yet none of these extreme measures were ever adopted there.* General DeWitt speaks often of the "sensitive" area it was his duty to protect.[198] It must have been sensitive, indeed, for though if was 1,500 miles away, it seemingly felt the force of the Pearl Harbor blow to a much greater degree than was the case at the very point of attack!

Unfortunately, General DeWitt has not been alone in this type of reasoning. Although the action which was under consideration then is not nearly as far-reaching as the one being decided now, in its Opinion in the *Hirabayashi* case this Court upheld the application of a curfew to those of Japanese ancestry on the West Coast, alone of all American citizens, because, in its words:

> "Although the results of the attack on Pearl Harbor were not fully disclosed until much later, it was known that the damage was extensive, and that the Japanese by their successes had gained a naval superiority over our forces in the Pacific which might enable them to seize Pearl Harbor, our largest naval base and the last stronghold of defense lying between Japan and the west coast."[199]

One might suppose that General DeWitt or anyone else who supports differential treatment for those of Japanese ancestry would be extremely diffident about calling attention to Hawaii. If there were not another single scrap of evidence in the wide world to suggest that evacua-

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[197] *Final Report* of General DeWitt, pp. 17-18.

[198] *Ibid.* p. vii.

was arbitrary, cruel and totally unnecessary, the waiian example would be sufficient. It is incredible, en the premise that man is capable of logical thought, t knowledge concerning what happened in Hawaii debate over the necessity of the West Coast evacua- can flourish at the time. The Hawaiian assault un- stakably answered the question of what persons of anese ancestry, alien residents and Americans of Japa- e ancestry alike, would do in the event of an attack by an. It answered the question of whether those of anese ancestry would take advantage of reverses, fusion and disaster to commit sabotage in the event of h an attack. It answered the question of whether a h column existed among those of Japanese descent h was ready to act when the enemy struck. It an- ered the question of whether the "ethnic affiliations" the people of Japanese ancestry residing in or native this country were with the United States or Japan. answered the question of whether the people of Japanese estry, if they were left unmolested and were assumed be patriotic and law-abiding, would co-operate cheer- ly for the common good and the common victory. The swers were given with the first thunder of the war and neral DeWitt, alone of all our military commanders, nored those answers completely.[200] Let it not be said those who write the history of law and the history of

[200] For material concerning the patriotic behavior and full cooperation h the authorities of the people of Japanese ancestry in Hawaii at the e of Pearl Harbor and since see: *Tolan Committee Report* of May, 2, pp. 48-58; Thomas Blake Clark, *Remember Pearl Harbor*, New York, dern Age Books, Inc., 1942; Thomas Blake Clark, "Japanese in Hawaii," *Republic*, September 14, 1942, pp. 308-10; Cecil Hengy Coggins, "The anese Americans in Hawaii," *Harpers Magazine*, June 1943, pp. 75-83; en M. Fisher, "Untruth About Japanese Americans," *Christian Century*,

man's conscience, that the highest court in this land, in order to gloss over a *fait accompli*, also ignored those answers.

Every excuse manufactured for mainland evacuation is as true or more true of Hawaii. General DeWitt has brought up the question of numbers. There were approximately 160,000 persons of Japanese ancestry in Hawaii and they were comprised, not one-thousandth of the population as on the mainland, but approximately 38 percent of the population.[201] General DeWitt has appealed to the argument of concentration. The 112,000 persons whom he ordered evacuated lived in the 324,123 square miles of the three West Coast States. All the Hawaiian Islands combined, where the 160,000 persons of Japanese ancestry continue to live undisturbed, have a total size of 6,449 square miles. General DeWitt attached special significance to the fact that "Japanese" lived in the vicinity of West Coast military installations. The "Japanese" of Hawaii have worked in the naval yards and military establishments of Hawaii, *before* and *since* Pearl Harbor.[202] General DeWitt sees a vindication of his policy in the existence of West Coast Japanese language schools. But the first Japanese language schools on American territory were established in Hawaii and continued to exist there until the beginning of the war.[203] General DeWitt talks of Japanese perfectual, social and business organizations. They were present in Hawaii, too. He appeals to fear over dual citizens and kibei. Hawaii had as gre

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[201] *Tolan Committee Report* of May, 1942, Table 1 (Japanese Population of the United States and Its Territories and Possessions, 1940), p. 94

[202] Thomas Blake Clark, *Remember Pearl Harbor*, 1942

r greater a proportion of them.[204] He asks us to take eriously the "reports" of signaling and of the sending f wireless messages to the enemy which streamed into his ffice during the first days of the war. In Hawaii, too, nnumerable and fantastic stories circulated initially, but he military commander *there* remained calm, and allowed ime to cut them down to their proper stature.[205] General DeWitt grows eloquent over the "attacks" on the West Coast, the small incendiary bomb which failed to tart a fire in Oregon, the shells which missed the Goleta il fields. Does he pretend to compare these with the lows which sank battleships, destroyed scores of aircraft nd inflicted thousands of casualties at Pearl Harbor? That Hawaii was in infinitely more danger than was the West Coast is not only apparent from its geographical osition, and from the fact that it was actually the object f the savage attack with which the war started, but it must also be remembered that martial law was speedily declared in Hawaii, though it was never proclaimed on the West Coast. It is plain from this that the army considered Hawaii a definite theater of war, and never so considered the West Coast of the mainland. Because of this, what was done in respect to persons of Japanese ancestry on the mainland could have been accomplished with much more show of legality in Hawaii. But it was

[204] Hearings before the Joint Committee on Hawaii, Congress of the U. S., 75th Congress, Second Session; Pursuant to S. Con. Res. 18 (Statehood for Hawaii), October 6 to 22, 1937, Washington, D. C., pp. 46-48, 57-58, 60-61, 66, 115, 147-58, 288-93, 295-97, 302-05, 309, 313-15, 470-76, 538-41, 389, 419-20, 586-87.

[205] Cecil Heftey Coggins, *Op. cit.*, p. 76; Kendall J. Fielder, Headquarters Hawaiian Department, Colonel, G.S.C., Ass't. of S, G-2, Office of the Assistant Chief of Staff for Military Intelligence. Quoted on page 16 of *70,000 American Refugees*, a pamphlet published by The Citizens Committee for

not done there and no one even suggests that there was cause or necessity for doing it. How much less cause or necessity, then, was there for a West Coast evacuation!

General DeWitt's insistence that lack of time and an extremely difficult military situation prevented any other course of action except evacuation, and made hearing boards unfeasible in particular, runs counter to still other facts.

The persons who were ordered out of their homes by General DeWitt's 108 civilian exclusion orders were not taken at once to the inland camps now known as Relocation Centers. These were not even built then. Instead they were removed to temporary concentration points *within the three West Coast States.* Race tracks such as Santa Anita and Tanforan in California and fair grounds such as the one at Pomona, California, were utilized as a stop-gap. In these make-shift "Assembly Centers" the people lived in appalling concentration for several more months. It was October 28, 1942, before a release from General DeWitt's headquarters permitted the newspapers to announce, "Transfer of persons of Japanese ancestry from strategic military areas on the West Coast will be completed by November 1, 1942."[206] Thus it was nearly eleven months after the attack on Pearl Harbor before persons of Japanese ancestry were out of the area which General DeWitt deemed subject to enemy attack. If General DeWitt's evacuation plans were designed to protect the coast during the early phase of the war, when Japan held the initiative, his method of dealing with the problem

even by his own standards, must be considered a dismal failure.

Furthermore, if "military necessity" was General DeWitt's guiding principle, we have a right to ask some very pertinent questions. Why, for instance, did the policy of mass evacuation continue after the Midway success had eliminated the danger of coastal attack? The people of Japanese ancestry were still in the temporary Assembly Centers. The huge and expensive task of building and manning the permanent Centers had not yet been undertaken. The business and property ties of many of the "Japanese" had not yet been severed. The immediate danger was much relaxed. Why could not hearing boards have been set up in June, 1942, then, and thousands of American citizens released to return to their homes, their jobs, their fields or wherever America's war and productive needs called them? There is no evidence that a thought of such a possibility ever crossed General DeWitt's mind. The machine which he had set into motion moved on inexorably, oblivious to human values, to citizenship rights or to the changing character of the war.

From this picture of General DeWitt's eleven months of "immoderate haste" during which evacuation was continuing, we turn to a consideration of the Hearing Board procedure which could have accomplished the purpose far better, in a fraction of the time and at an expense so much less that it staggers the imagination to contemplate it. It should be kept in mind that by November 30, 1942, the cost to the government of building Centers and removing evacuees to them already totaled $88,679,716.69.[207] Hundreds of persons connected with the Federal Reserve

Bank, the Farm Security Administration, the Wartime Civil Control Administration, the Army, the Intelligence Services, the Bureau of Naturalization and Immigration, the Office for Emergency Management; the Federal Security Agency, and the Federal Works Agency, to mention only the most important organizations involved, had been employed for months at this task of uprooting a people. A foolproof inquiry into the loyalty of every person in the nation could have been consummated at less cost and effort.

If General DeWitt had only known it, there had already grown out of the war an ideal parallel for the mistake which he was to make, and an excellent example of the manner in which to correct it.

At the beginning of the war with Germany, England created 112 alien tribunals or hearing boards, and over 74,000 enemy aliens were summoned before them. *This large number of cases was examined in six months.* As a result of the hearings two thousand persons were interned, approximately 8,000 were made subject to special restrictions, and the rest went their usual way.[208]

When the Low Countries were overrun, however, and France collapsed, panic seized the nation. As in this country the correlation between military reverse and repressive action was high. June 21, 1940, the day on which France fell, became "general internment" day in England. Practically every alien was taken into cus-

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[208] Maximilian Koessler, "Enemy Alien Internment, With Special Reference to Great Britain and France," *Political Science Quarterly*, Vol. LVII, No. 1, March, 1942, p. 402; Robert M. W. Kempner, "The Enemy Alien Problem in the Present War," *American Journal of International*

tody.[209] Even the refugees from Germany were not spared, for a rumor had gained ground to the effect that Hitler had sent spies to England in the guise of persons seeking asylum.[210] The same two types of thinking now emerged which have also marked the debate over evacuation in this country. Mr. Pickthorn, who inclines toward the DeWitt point of view, asserted in the House of Commons, on August 22, 1940:

> "If an archangel appeared before all the members of the War Cabinet at once and said, 'There is one red-headed man in England who, unless care is taken, will do something to injure the State,' I think it would be the duty of the war Cabinet to see that all red-headed men were interned . . . ."[211]

To this, Mr. Wedgwood, who comes somewhat nearer our view, responded:

> "Every nation is divided into two different schools of thought, one school on our side and the other school on the Nazi side. It is out of date to talk of enemy aliens . . . . The danger (if the Germans invade this country) would come from the Fascist party, from people who were defeatists, and from people who have nothing to lose if Hitler comes here . . . ."[212]

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[209] Maximilian Koessler, *op. cit.*, pp. 104-05; Francis Biddle, "The Problem of Alien Enemies," *Free World*, Vol. III, No. 3, August, 1942, p. 203; *Refugees in Britain*, A boardsheet issued by Political and Economic Planning, (printed by St. Clements Press, Ltd., and published by Political and Economic Planning, 16, Queen Anne's Gate, London), No. 216, January 14, 1944, pp. 5-11.

[210] Maximilian Koessler, *Op. cit.*, p. 105.

[211] *Idem.*

Our own Attorney-General Biddle has described England's brief capitulation to the DeWitt formula and the subsequent reaction of the English against it:

> "The Government yielded to the pressure and all aliens were thrown into hastily laid out camps. Conditions there were bad. Britons themselves deplored the error. Sir John Anderson, then Home Secretary, said the wholesale internment victimized 'some of the bitterest and most active enemies of the Nazi regime.' Said Rhys Davies: 'I am sure the treatment meted out to our alien population in the last few months is not the result of cruel intention but of panic and sheer stupidity.' A letter to the *Times*, signed by a group of prominent Londoners, among them H. G. Wells, included the opinion that 'nothing could be more calculated to dishearten our friends and allies in Germany and Austria than the news that Britain has put under lock and key her own anti-Nazis of German and Austrian origin.' Then the reaction set in. The British public, having undergone a few bombing raids, ran true to form. In real danger the British forgot their fears. Letters began pouring in to the internees at the rate of 120,000 a week. Pressure again was exerted on public officials. Picking and choosing started all over again."[213]

It was not long before the Home Secretary was able to say:

> "Of scores of thousands of aliens, only 9,700 are still detained. A democracy confident of its cause and of itself does not need to use a big stick at home."[214]

[213] Francis Biddle, "The Problem of Alien Enemy," *Free World*, p. 203

[214] Alan Cranston, "Enemy Aliens," *Common Ground*, Winter, 1942, p.

We emphasize that the persons whom England refused to keep in internment without hearings or evidence of individual guilt, even in the face of air raids and while the Germans were singing "We Sail for England" a scant twenty miles away, were not British subjects but *enemy aliens.*

It is important to realize that when West Coast security and the relation of the "Japanese" population to fears concerning that security were under discussion, the establishment of Hearing Boards was repeatedly advanced as an alternative to mass evacuation.

Dr. Galen Fisher, distinguished West Coast civic and religious leader has described the fruitless struggle for Hearing Boards in which he and other eminent West Coast residents engaged with General DeWitt:

> ". . . the Committee on National Security and Fair Play advocated selectivity for all Japanese, until it became apparent that this had been ruled out for Japanese *aliens* by General DeWitt. Thereafter, the committee advocated selectivity for *citizens* of Japanese parentage. In this position it was joined by the religious and social work leaders of the coast, as well as by influential representatives of the bar. In a studied opinion dated March 6, 1942, and submitted to State Attorney-General Warren, Mr. Gerald H. Hager, former president of the California State Bar Association, contended that 'the loyal Japanese-Americans should be given some reasonable opportunity to prove that it is unnecessary for them to remain outside of a specified area,' and he suggested that 'some board or other tribunal could be set up' for that purpose.

"The above-mentioned committee, in a memorandum presented to General DeWitt on March 9, argued thus:

"'Let all *nisei* be given the opportunity of being examined as to their loyalty or disloyalty by hearing boards in the communities where they now reside. The Appeal Boards of the Selective Service appear to be made to order for this purpose . . . The process could be completed in six weeks at the outside . . . The proposed evacuation of the entire group of *nisei*, but of no other group of citizens, apparently on the basis of race, is already embittering some of them and making them turn a ready ear to communist and other subversive ideas. It is also causing acute distress to many white citizens like ourselves, who are concerned over every violation of the democratic principles for which we are fighting . . . Furthermore, the indiscriminate evacuation of *nisei* citizens will, in our judgment, weaken rather than strengthen the civic morale which is an essential element in national security during the war and of national unity after the war.'

"The constitutional validity of evacuating *aliens* of any nationality without a hearing or other 'due process of law' was generally accepted by both sides of this controversy. Evacuation of *citizens*, short of martial law, was held by some witnesses before the Tolan Committee, by members of Congress, and by the Tolan Committee itself, to be constitutionally dubious."[215]

In another article Dr. Fisher, who was in closest touch with the situation during the policy-making period, again

discusses the vain attempt to win the General over to the concept of Hearing Boards. This time he gives added details concerning the identity of the distinguished citizens who urged the adoption of the Boards, and, even more important, he reveals the grounds upon which the General rejected their proposal. It turns out to be nothing more reasonable than the fantastic race theory of General DeWitt which we have encountered before;

> "Eminent groups of citizens, such as the Committee on National Security and Fair Play, headed by General David Barrows, Henry F. Grady, Presidents Sproul and Wilbur and Dr. Robert A. Millikan, urged General DeWitt to set up such Boards. They and many others familiar with the Japanese residents held that it would be but little harder to distinguish the dangerous from the loyal Japanese than in the case of persons of most other races, and that, by utilizing the Appeal Boards of the Draft, the hearings could be completed within five weeks. Even though a large number should be found disloyal or doubtful, and therefore refused exemption from evacuation, the mere fact of having been given a hearing would have a deep influence on morale, and would vindicate for all citizens the cherished guarantee of the Constitution, of 'due process of law.'
>
> "General DeWitt finally declined to allow hearings. His representatives argued that they would cause delay when speed was urgent, and that it would be practically impossible to establish the loyalty of anyone of Japanese race."[216]

[216] Galen M. Fisher, "The Drama of Japanese Evacuation," in *A Touch-*

Prominent leaders of the West Coast were not the only persons who raised their voices in favor of the establishment of hearing boards. On April 30, 1942, over two hundred well-known citizens of the eastern part of the country, among them John Dewey, Harry Emerson Fosdick, Alfred Bingham, the Rt. Rev. Mons. Liugi G. Ligutti and Mary E. Woolley, recognizing the uselessness of attempting to deal with General DeWitt, penned a letter which they sent directly to the President. In it they said:

> "The immediate and specific purpose of this letter is to urge you to extend to Japanese aliens, and especially to citizens of Japanese origin on the West Coast, the right to a hearing before civilian boards to attest their loyalty. This should be done, if possible, before evacuation from their homes and business, but also, in cases where they have already been removed, in order to establish the right to return to their homes.
>
> "This is a principle partially established in dealing with German and Italian aliens. It has been recommended in detail by the Tolan Committee of the House of Representatives for the benefit of Italian and German aliens resident in the great area from which all Japanese have been evacuated. To grant to Italian and German aliens a right denied to American citizens of Japanese origin is a type of race discrimination for which there is no ethical justification. Many of these citizens are graduates of our schools and colleges whose usefulness as workers and citizens has been attested by the leaders of communities in which they live. This whole process, we believe, is of itself a blow to our democracy and will gravely

affect our reputation for racial fair play among the nations of the world. It is the type of discrimination which, throughout much of Asia, will greatly strengthen the hands of our enemies."[217]

Not only did distinguished lawyers, educators, churchman and civic leaders speak out convincingly and boldly for Hearing Boards, but the articulate among those who were closest to the problem, and who, indeed, had the responsibility of protecting the coast from subversive activity, indicated that they were of the same opinion. In October, 1942, *Harper's Magazine* printed an article of which the editors said:

> "The following statement . . . . was prepared in May, 1942, by an intelligence officer who for a number of years was stationed on the West Coast and who during that time had made a particular study of the Japanese population. . . . It will be noted that *individual examination* is the core of the author's proposal. . . ."[218]

As the editors of *Harper's* indicate, the statement, first written as a confidential memorandum, is a direct and informed plea for hearing boards and a discussion of what their composition and nature should be. This intelligence officer ends by asserting:

> "The entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the

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[217] A letter to the President of the United States signed by over 200 interested citizens, dated April 30, 1942. Printed and distributed by the Post War World Council, 112 East Nineteenth Street, New York City, June, 1942.

[218] An Intelligence Officer, "The Japanese in America: The Problem and the Solution," *Harpers Magazine*, October, 1942, p. 490.

physical characteristics of the people. It should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis."[219]

General DeWitt's argument that swift Japanese successes and the possibility of the invasion of the West Coast left him no alternative but to order evacuation, is not in accord with the facts. Actually the evacuation was not completed until eleven months after the outbreak of war and the most painful aspects of it occurred when the military crisis had already passed. No such policy was put into effect in Hawaii, though that place was the center of actual attack, though martial law had been declared there, and though the conditions which General DeWitt pointed to on the coast were true also of the islands. A military and internal condition on our East Coast which was quite as critical as anything General DeWitt confronted, was not inflated to a "military necessity" requiring mass evacuation of citizens on the basis of ancestry. To satisfy any misgivings that the public might have felt, hearing boards could easily have been set up. England had used such hearing boards to advantage. Persons of prominence and position, who have had abundant executive experience and social responsibility and who might be expected to know what is feasible and workable, urged the use of hearing boards upon the General. General DeWitt made no secret of the fact that his rejection of these suggestions was grounded in race prejudice.

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[219] *Ibid.*, p. 497.

10. The Doctrine of Protective Custody Is Un-American and Dangerous to Our Institutions. There Was no Public Threat to Persons of Japanese Ancestry and no Genuine Popular Demand That They Be Removed.

When Attorney-General Biddle announced to the nation's press that the President had signed the executive order which was to become the authority for the mass evacuation of citizens, he said, "The move has been taken largely for the protection of the Japanese themselves."[220] Two months later, Secretay of War Stimson asserted in a letter to Mary W. Hillyer of the Post War World Council that the evacuation was "imperative, not only for the safety of our country but for their own protection."[221]

This insistence that evacuation was a form of "protective custody" and really sprang from solicitude for the people involved, has been greeted, and rightfully so, with scepticism and alarm by those concerned for this country's good name and future.

Dr. Robert Redfield, Dean of the Division of the Social Sciences of the University of Chicago, has written on the point:

> "When it is argued that these people had to be evacuated for their own protection from a fearful and angry Caucasian population, it will be asked if the government is establishing a principle of 'protec-

[220] *New York Times*, February 21, 1942. (Special dispatch of Lewis Wood of February 20 from Washington.)

[221] Letter of May 25, 1942, of Henry L. Stimson, Secretary of War, to Mary W. Hillyer. Copies mimeographed and distributed by the Post War World Council, 112 East Nineteenth Street, New York City.

tive custody' of suspiciously foreign flavor and offensive to the Bill of Rights."[222]

The claims for "protective custody" have also been examined by William Henry Chamberlin, who points to the obvious dangers involved:

> "It (evacuation) is not a reprisal for proved disloyalty; it could be regarded either as preventive punishment or as 'protective custody.'
>
> "There is almost nothing that could not be done under the principle of preventive punishment. And no group that might in the future be unpopular in some locality for reasons of race, color, or religion, could feel safe if the consequence of a threat of mob violence should be not the maintenance of law and order, but the uprooting and deportation of the threatened group."[223]

The ominous turn in American policy which evacuation has brought is sharply criticized, too, in a recent issue of *Fortune Magazine:*

> "The American custom in the past has been to lock up the citizen who commits violence, not the victim of his threats and blows. The doctrine of 'Protective custody' could prove altogether too convenient a weapon in many other situations. In California, a state with a long history of race hatred and vigilanteism, antagonism is already building against the Negroes who have come in for war jobs. What is to prevent their removal to jails, to 'protect them' from

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[222]Robert Redfield, "The Japanese Americans," in *American Society in Wartime*, Edited by William F. Ogburn, University of Chicago Press, 1943, p. 160.

[223]William Henry Chamberlin, "Why Civil Liberties Now?" *Harpers Magazine*, October, 1942, pp. 330-31.

riots? Or Negroes in Detroit, Jews in Boston, Mexicans in Texas? The possibilities of 'protective custody' are endless, as the Nazis have amply proved."[224]

Not only is the doctrine of "protective custody" un-American, evil, and dangerous in any case; it was totally unnecessary and unwarranted in this particular case. The great mass of the people of the West Coast, including the people of California, were initially disposed and determined to be just, fair and calm. If they had been encouraged in that resolve by the government, if the relevant facts, such as the truth about the blameless behavior of Japanese residents and citizens of Japanese ancestry in Hawaii on December 7 had been promptly released, if the government had harkened to evidence rather than to opinion, and to representative citizens instead of to pressure groups whose very origins and purposes are rooted in bigotry, the execrable rationalization of "protective custody" would not have to be offered today.

General DeWitt in his *Final Report* carries forward the argument of the need for protective custody. He claims that "the situation was fraught with danger to the Japanese population itself"[225] and that the West Coast public "was ready to take matters into its own hands."[226] His discussion of the "incidents of violence" however, is exceedingly brief and vague. He does not tell us when or where violence occurred or how many injuries or fatalities were sustained. Finally he admits that many of the alleged

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[224]"Issei, Nisei, Kibei," *Fortune Magazine*, Vol. XXIX, No. 4, April, 1944, p. 118.

[225]*Final Report* of General DeWitt, p. 8.

[226]*Ibid.*, p. 9.

incidents which were reported "were subsequently either unverified or were found to be cumulative."[227] Mr. Carey McWilliams, who was Commissioner of Immigration and Housing of California at the time evacuation began, supplies the missing information. He informs us:

> "Actually, there are only two reported instances of violence. On December 27, 1941, a fight occurred between Filipinos and local Japanese in Stockton, California; and on January 1, 1942, unknown persons fired several shots at a Japanese in Gilroy."[228]

The fact that practically all of the violence and threats of violence came from Filipinos is in itself significant. The Filipinos are a West Coast minority group who in recent years have been treated far more badly than have the Japanese, and who were much more depressed economically and socially.[229] With the Japanese invasion of the Philippines these people found themselves, for the first time since their arrival in America, favorably considered by white Americans. Their initial over-compensation, once they could act aggressively and be accepted as American patriots, is much more a comment on the repression they have suffered at the hands of the West Coast anti-Oriental bloc, than it is on the situation of the "Japanese."

The fact is that responsible and influential individuals and groups on the West Coast and even further inland were determined, long before hostilities actually began, to prevent excesses in case of war between the United States and Japan.

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[227] *Idem.*

[228] Carey McWilliams, *What About Our Japanese-Americans?*, Public Affairs Pamphlets, No. 91, 1944; p. 8.

[229] Bruno Lasker, *Filipino Immigration*, University of Chicago Press, 1931, pp. 19, 20, 36, 63, 83, 92, 149, 296, 307; 323, 331.

Under the caption "Americanism," the San Pedro, California, *New Pilot*, published an editorial in December, 1940, praising the "loyalty and patriotism" of Japanese-Americans which ended by declaring:

> "Of all the various groupings of California citizens, the Japanese have the lowest crime rate, the best credit rate, no relief cases at public expense, and the highest voting turnout at election time. Try to beat that."[230]

In mid-February, 1941, Commander Maurice Sparling, U. S. N., who was attached to the Los Angeles Selective Service headquarters, addressed a banquet in honor of Japanese-American volunteers and draftees which was jointly sponsored by the Commodore Perry Post of the American Legion and the Los Angeles Branch of the Japanese American Citizens League. Later he issued this statement:

> "They are a fine group of boys, individually and collectively, all eager to prove themselves worthy of the trust they hold, and I am confident they will make the best type of American soldier."[231]

In the spring of 1941 Americans of Japanese ancestry of the intermountain states drafted a loyalty and service pledge and sent it to the governors of the states in which they resided. Governor Chase A. Clark of Idaho responded, "There has never been a single doubt as to the loyalty of the Americans of Japanese ancestry to the United States."[232] Governor Herbert B. Maw of Utah

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[230]Reprinted in the *Japanese American Review*, December 14, 1940. (A weekly of the Japanese community, published in New York City.)

[231]The *Japanese American Review*, February 22, 1941.

[232]*Japanese American Review*, April 5, 1941.

answered, "I know of no young Japanese who is not a good American."[233] Resolutions of appreciation for the good citizenship of Japanese Americans were passed by both houses of the Utah State Legislature.[234]

In May, 1941, the *Bainbridge Review* of Bainbridge, Washington, carried an editorial which took notice of the usual "charges" against young Americans of Japanese ancestry, such as their attendance at language schools, and then went on to say:

> "But we also know this from our own knowledge: Japanese students consistently make good records as scholars; Japanese students are leaders in extra-curricular activities at our high school; the Japanese on the relief rolls is a distinct oddity; the Japanese who finds himself jailed for crime is as rare as a dodo bird.
>
> "Finally we know that the Selective Service Board of Kitsap has called to the colors of our nation . . . a dozen youths from Bainbridge Island. Four of these, one-third of the total, have been Japanese.
>
> "Each Japanese boy has been honored by a banquet. Why? Because this Japanese colony is intensely proud of the fact that Uncle Sam is looking with perfect equality on all who obtain the right to citizenship."[235]

The scene of good will shifts now to Los Angeles where Mayor Fletcher Bowron in early August declared in an address:

> "If war does come, and we continue to hope it will not, the resident Japanese will face a difficult—and I

[233] *Idem.*
[234] *Idem.*
[235] Reprinted in the *Japanese American Review*, May 17, 1941.

hope none too unpleasant—situation. We have every reason to have faith in your loyalty. You have demonstrated by every sign called to my attention your desire to serve as loyal Americans, for which I commend you."[236]

At about the same time the *Los Angeles Times* took note of the oversubscription by the Americans of Japanese ancestry of their U. S. O. quota:

> "'American-born Japanese of Los Angeles yesterday testified to loyalty to America and their interest in the welfare of American soldiers and sailors by contributing to the United Service Organizations $1,500.00 or 120 percent of the $1,200.00 quota. . . ."[237]

At about this same time, Mr. Garland, Speaker of the California State Assembly, extolled the virtues of citizens of Japanese ancestry in California at a good will dinner in Los Angeles. Most of the State Assemblymen from Los Angeles County were in attendance. The speaker particularly emphasized "the role of the Japanese in making California the agricultural leader of the United States."[238]

Meanwhile in Stockton, California, the *Stockton Record* struck out editorially against allowing events in the Pacific to color attitudes toward Americans of Japanese ancestry, saying:

> "It must be recognized that most of the residents of Japanese blood are American citizens, a status they gained by being born here. Also, as shown by practi-

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[236] *Japanese American Review*, August 9, 1941.
[237] *Idem.*
[238] *Japanese American Review*, August 23, 1941.

cally every list of Stockton draftees called to the colors, the young Japanese, American-born and educated, and knowing no other homeland, are accepting their patriotic responsibilities in the same spirit as other youths.

"To all these Americans of Japanese background, Nippon's rampage is as distasteful as to the rest of us. Japan's acts are embarrassing to these people. They fear the reactions on themselves. They should be assured that they will be treated as they have been in the past so long as their allegiance is undivided."[239]

In early September of 1941 Raymond Lawrence of the Oakland, California, *Tribune* published an editorial written in a similar vein. It reminded its readers that:

"Most of these Japanese are American citizens educated in our schools, familiar with no culture save ours, and as loyal to this country as are any others.

"In every list of draftees called to the colors there have been young Japanese who have known no other homeland and who are accepting their patriotic responsibilities in the common spirit of our youth.

"The Americans who are Japanese have supported to the full the U. S. O., defense bond campaigns, and all of the programs of defense. They are contributing man-power and ideas to this country. The Americans who permit emotions or suspicions to run away with them, may be guilty of an affront to the very philosophy and allegiance which the American-born Japanese have acquired in this democracy. . . . It would be tragic and un-American if we allowed events in the Pacific to alter our appreciation and estimate

[239]Reprinted in the *Japanese American Review*, August 23, 1941.

of men and women of Japanese inheritance who put this country first in their thoughts."[240]

Another article indicative of the eagerness of the Caucasian majority to retain perspective, was penned at the end of September, 1941, by Hal Johnson, columnist of the *Berkeley Gazette*. Said this writer:

> "Legally they (Americans of Japanese ancestry) are just as much American as those of us whose ancestors came to this country *via* the Mayflower or on some of the later boats. These 'Japamericanese' are loyal Americans. They share their fellow-Americans' growing hatred of the pro-Axis army and navy leaders of Japan. And probably 99 per cent of all the Japanese population of the Pacific Slope is out of sympathy with Nippon Leadership . . . there are 500 Japanese-American young men in Camp Ord and some 25 are from Berkeley. Many of the 'Japamericanese' didn't wait to see what numbers were coming up in the big 'goldfish bowl'—they enlisted."[241]

Collier's Magazine sent James Marshall to the West Coast in October, 1941. After a thorough testing of sentiment, Marshall was ready to say:

> "In case of war, there would be some demand in California for concentration camps into which Japanese and Japanese-Americans would be herded for the duration . . . . Army, Navy or F. B. I. never have suggested officially that such a step would be necessary or even has been thought about. As we have seen, their opinion, *based on intensive and continuous investigation, is that the situation is not*

[240]Reprinted in the *Japanese American Review*: September 26, 1941.

[241]Reprinted in the *Japanese American Review*, October 4, 1941.

dangerous and that, whatever happens, there is not likely to be any trouble. With this opinion West Coast newspapermen, in touch with the problem for years, agree almost unanimously (emphasis supplied)."[242]

The campaign for fair play and reason continued through the autumn of 1941. In late October the *Sun* of San Gabriel, California, ran a pointed editorial on the subject:

"We don't have to make a case for the Japanese in this country. We've done that before, and we stand by our guns. The Japanese young people who were born in this country and hence are American citizens are good American citizens—as good as the best, and there's no need to doubt their loyalty.

"They've proved themselves good citizens in the best possible way—by staying out of the courts and off police rolls, by remaining off the relief lists, by oversubscribing their U. S. O. quotas, by purchasing defense bonds to the point of sacrifice.

"Patriotic Americans believe in fair play. And their very safety depends on real unity. The easiest way to break down that unity is to create suspicion among one group of Americans in regard to some other group. Let's squelch this talk whenever we hear it."[243]

The newspapers of the West Coast were joined by the Church in the effort to maintain national unity and justice. An example of the attitude of religious bodies is this

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[242]James Marshall, "West Coast Japanese," *Collier's Magazine*, October 11, 1941, p. 15.

[243]Reprinted in the *Japanese American Review*, November 1, 1941.

resolution of the Seattle Council of Churches, passed in late November, 1941:

> "We wish to congratulate you on the good record the Japanese in the United States have for being a law-abiding people. Both the first generation and the Nisei are above average in the matter of good citizenship and the observances of the best social usages. We feel that you have nothing to fear from the American government or the American people as long as you continue such conduct.
>
> "We wish to assure you of the sympathy and cooperation of the Church. We urge you to take any problem that may arise because of the international situation, or because of any local matter, to any Christian with whom you may be acquainted. Please do not hesitate to confer with any Christian pastor relative to any problem that may arise."[244]

The beginning of the war did not reverse the dominant attitude of fairness on the part of the press and representative citizens. One writer, after a thorough analysis of West Coast newspapers and opinion for the period describes the prevailing sentiment thus:

> "During the first weeks of the war the dominant tenor of news stories was for fairness and tolerance, restrictions applied equally to all enemy aliens, and *There was no mention of total evacuation!* If the military had sound reasons for it, they were not apparent nor put forward in the weeks immediately following Pearl Harbor."[245]

[244] *Japanese American Review*, November 29, 1941.

[245] Caleb Foote, *Outcasts*, 1944, p. 5. (A pamphlet published at 2929 Broadway, New York City.)

It is obvious that in these first days of the war it was the belief of government officials and even of politicians that sanity should and would be preserved. On the day after Pearl Harbor Attorney-General Biddle could say:

> "There are in the United States many persons of Japanese extraction whose loyalty to the country, even in the present emergency, is unquestioned. It would therefore be a serious mistake to take any action against these people."[246]

This mood was evident in Congress, too. On December 10, 1941, Congressman Gearhart of California arose in the House of Representatives to say, in response to a message from the Japanese of Fresno, California:

> "Mr. Speaker, it is today my privilege to transmit to the President of the United States a copy of a telegram, the original of which I have just received from an American patriot of Japanese origin. Because of the warm assurance of support of our just cause which it contains, I am pleased to inform the membership and the country of its contents."[247]

Two days later Representative John M. Coffee of the State of Washington said in the House:

> "As one who has lived as a neighbor to Japanese-Americans, I have found these people, on the whole, to be law-abiding, industrious, and unobtrusive. Let us not make a mockery of our Bill of Rights by mistreating these folks. Let us rather regard them with understanding, remembering they are the victims of

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[246] Quoted from the *San Francisco Chronicle*, December 9, 1941.

[247] *Congressional Record*, House, December 10, 1941.

a Japanese war machine, with the making of the international policies of which they had nothing to do."[248]

All informed opinion agrees that in the early days of the war, when shock and resentment over Pearl Harbor was at a maximum, there was relatively little tendency to make persons of Japanese ancestry the scapegoat for events in the Pacific. The American Civil Liberties Union is particularly sensitive to any acts of discrimination and to infringements of rights of minorities, but in the December 20, 1941, issue of *The Open Forum*, the organ of the Southern California Branch, we find these reassuring sentences:

> "The feelings of many people were highly wrought up, but we are happy to report that little in the way of vigilante action occurred. There were threats, angry words and name-calling, but very few genuine cases of assault on persons or property."[249]

From further north came a statement from Richard L. Neuberger, keen student of Pacific Northwest problems:

> ". . . no demonstrations against Japanese residents have occurred. Governor Culbert L. Olson of California asked for tolerance in the state with the largest Japanese population. John Boettiger, the President's son-in-law, wrote in the Seattle *Post-Intelligencer*, 'Many of the Japanese in America are as loyal as any white Americans, and it would serve only evil purposes to cause them to suffer'."[250]

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[248] *Congressional Record*, Appendix, December 12, 1941.

[249] *The Open Forum*, Vol. XVIII, No. 51, December 20, 1941, p. 2.

[250] Richard L. Neuberger, "Reveille in the Northwest," *The Nation*, December 20, 1941, p. 638.

Chester H. Rowell, one of the most respected figures of the West Coast newspaper world, was able to write on December 13:

> "Many of them (Americans of Japanese ancestry) are now serving in our army, and many of the others are organizing patriotic societies, rendering to this land of their birth more loyalty than we have earned of them. The older Japanese have gradually found their several places in the community. If it were not for the misdeeds of the army of their native country, their own generally excellent conduct would have won for them and for their descendants the place which the Chinese, by one generation more of similar conduct, have already won for themselves. . .
>
> "I am glad to report that, so far, there has been no evidence of any such feeling (anti-American-Japanese sentiment). For their part, Japanese loyal to the United States are organizing excellently and vigorously. Old-line Americans, under the highest quality of responsible leadership, are doing the same thing. The actually disloyal we leave to the FBI and the military police, to be dealt with as individuals, like any other disloyal individuals. . . We who know our California Japanese as individuals know what fine people many of them are."[251]

On January 1, 1942, *The Japanese American Courier*, a newspaper published in Enlish in Seattle, Washington, for members of the Japanese community, celebrated its 14th Anniversary. Though this was nearly a month after the outbreak of war, messages of congratulation and assurances of faith in Americans of Japanese ancestry streamed

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[251]Chester H. Rowell, "Clash of Two Worlds," *Survey Graphic*, January, 1942, p. 13.

into the editorial offices from West Coast civic, business, educational and political leaders. Ray Lyman Wilbur, President of Stanford University and former Secretary of the Interior, wrote optimistically:

> "We look upon those who have been born into Japanese families here as worthy American citizens, fully capable of giving all of that loyalty and support which any citizen gives to his native land.
>
> "While there will be some difficulties I think that with good spirit we may come out of this present period of war with a much better situation for all of our American citizens of Japanese origin. Certainly no group has shown a greater willingness to work hard, to improve themselves and to advance their families than have the Japanese here in America. We are proud of them and have confidence in them."[252]

From Marshall N. Dana came a warm greeting and a prophecy which has already come true:

> "They (Americans of Japanese ancestry) have often found words with which to vehicle the patriotism of Americans of Anglo-Saxon heritage. Their services have often been summed up into deeds contributive to broader freedom, realistic democracy and higher ideals for America. When the war is over, some of them will be listed among American heroes. Now, therefore, they are entitled to our respect and co-operation."[253]

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[252] *The Japanese American Courier*, 14th Anniversary—"All-out for America" Issue, Vol. XV, No. 729, January 1, 1942. (Seattle, Washington.)

[253] *Idem.*

This message came from Charles A. Sprague, Governor of Oregon:

> "I commend our Japanese American citizens for their loyalty to this country during this time of international strain. I want them to know that I appreciate the situation in which they are placed and want them to suffer no discrimination personally or economically because of their ancestry. . . In this period of difficulty let us keep our heads and try to live in this land of freedom on a basis of mutual trust."[254]

The President of the Seattle Chamber of Commerce, Emil G. Sick, had this to say:

> "I take special pleasure in greeting the American-born Japanese of Seattle at the start of this year.
>
> There is not a more loyal and conscientious group, anxious to do its part in every community, state and national endeavor than these Japanese people. This has been graphically demonstrated many times."[255]

Stephen F. Chadwick, Seattle Attorney and former National Commander of the American Legion, took the occasion to reaffirm his "confidence in the loyalty and patriotism of the American-born Japanese." He went on to observe:

> "I see you as a group whose ancestors came to this country to get away from the lack of freedom and opportunity which existed under the substantially feudal baronism and the war lords who have ridden the people of Japan. . . You are, with us, American

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[254] *Idem.*

[255] *Idem.*

citizens, and it is my hope that all Americans will look upon you as such. . . . Many opportunities of service will suggest themselves to the American-born Japanese, and I assure these young men and women that I look to them with confidence to perform their service to America and to her institutions."[256]

The manager of the Washington State Taxpayers Association, Mr. Floyd Oles, sent this word of commendation:

"As you know, it has been my privilege for many years now to be closely associated with the Japanese American citizens in their daily work. . . . In appraising the success with which these young people have adapted themselves to American ways and have overcome to a large extent the added difficulty of racial characteristics different from those of their fellow American neighbors, I believe I can do so with an unusual degree of personal appreciation. I have found among the Japanese Americans whom I know, not only the qualities I have above mentioned but an enthusiasm for American institutions and for personal participation in the life of this land that have been to me both refreshing and inspiring."[257]

The excellent state of public opinion at this time can be gaged from the conviction of Professor Charles E. Martin, Chairman of the Department of Political Science of the University of Washington, that no upheaval would occur. In his word of greeting he declared:

"The American citizens of Japanese ancestry have a record of good citizenship and respect for law which speaks for itself. They only ask to be allowed to

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[256] *Idem.*

[257] *Idem.*

stand on their record, past, present, and future. That this will be the attitude and point of view of the overwhelming majority of Americans in peace and war is my earnest conviction."[258]

The same issue of the *Japanese American Courier* which carried these laudatory statements, also carried the text of a letter from the Board of Directors of the Seattle Y. W. C. A. to Mayor Earl Millikin. Mayor Millikin, the day after Pearl Harbor, had written a letter to the Seattle *Post-Intelligencer*, pleading for fair play toward Americans of Japanese ancestry. Of this action the governing Board of Christian Organization said:

"The Board of Directors of the Young Women's Christian Association wishes to commend you on your immediate and thoughtful stand taken in your letter to the *Post-Intelligencer* on December 8 concerning our Japanese American citizens.

"Your faith in these loyal citizens will do much to make for understanding and building a spirit of law and orderliness in Seattle. This in turn will create a morale that can be depended upon."[259]

During these first days and weeks of the war, expressions and acts of understanding and kindness came from all directions. Lieutenant Commander Ringle of the Los Angeles Harbor Naval District Intelligence, who had an American girl of Japanese ancestry in his employ, announced publicly on December 8 that he would retain her services as a symbol of his faith in the Japanese people. Since this officer had been investigating any alleged sub-

[258] *Idem.*

[259] *Idem.*

versive activity among persons of Japanese ancestry for a long time, his "faith" was based on the widest knowledge obtainable.[260]

Other minority groups pledged themselves to respect the rights of Americans of Japanese ancestry, too. The leading newspaper of the Los Angeles Negro community, the *Los Angeles Sentinel*, editorialized on December 11:

> "The fact that this nation is at war with Japan must not be used as an excuse for attacks on loyal Japanese citizens of this country. . . . Many Japanese business men are located right here in our (Negro) community. They have played an honorable and decent part in community activities and any persons molesting them deserve to be prosecuted to the fullest extent of the law. After all we have been the victim of race hysteria too many times to lend ourselves to persecution of other peoples whose only crime is that they are of a different color or race from ourselves."[261]

In late January expert opinion still was satisfied that there was no need for evacuation, and certainly no compelling public demand for it. In a summary published January 26, 1942, John H. Oakie of the Institute for Pacific Relations felt confident enough of the ultimate triumph of tolerance to assert:

> "If the infrequency of reports of violence against Japanese and Japanese-Americans is a fair criterion, then it must be concluded that these efforts to ensure

[260] *Newsletter*, mimeographed newsheet of the Conference Between Americans of Occidental and Oriental Ancestry, 822 East 20th Street, Los Angeles, California, Vol. 1, No. 3, January 13, 1942, p. 5.

[261] *Los Angeles Sentinel*, Los Angeles, California, December 11, 1941.

the position of this minority have been, in the main, successful. The record, as read by the Northern California Committee on Fair Play for Citizens and Aliens of Japanese Ancestry, may very well apply in the nation as a whole. In its release of December 29, 1941, the Committee said: 'The central objective of our Committee on Fair Play has been supported by the California public, even under the stress of Japan's treacherous attack. Californians have kept their heads. There have been few if any serious denials of civil rights to either aliens or citizens of Japanese race on account of war. The American tradition of fair play has been observed'."[262]

Mr. Oakie and the Fair Play Committee could well be satisfied with public temper and conditions as they stood in late January. A careful analysis of the hundreds of news stories which were carried concerning Americans of Japanese ancestry from December, 1941, to March 3, 1942, in two prominent San Francisco papers (one the liberal *Chronicle* and the other Hearst's *San Francisco Examiner*) reveals that *before January 22 there were only two suggestions that evacuation be undertaken.* Both of these occurred in the period January 1-10, 1942.[263] It was not until the last ten days of January that such suggestions became frequent and then they were limited almost entirely to political figures bent on stirring up an issue and interested in securing cheap wartime publicity. This was so obvious that the *San Francisco Chronicle*, on February

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[262] John H. Oakie, "Japanese in the United States," *The Far Eastern Survey*, January 26, 1942, p. 26.

[263] *Evacuation*, a pamphlet issued at 2151 Vine Street, Berkeley, California, January 22, 1943, p. 5.

6, 1942, lectured those who were deliberately fomenting public uneasiness:

> "The supposed 'hysteria' over enemy aliens and their descendents scarcely exists among the people themselves. . . but the excitement is visible almost entirely in political and journalistic quarters. . . They are seeking to capitalize on a supposed excitement of others which is mostly a figment of their own imaginations."[264]

Nevertheless, even after alarmists and extremists were attempting to create animosity and suspicion, many powerful voices were being raised on behalf of persons of Japanese ancestry, and the outcome of the alignment of forces was for some time in great doubt. On February 2, 1942, Governor Olson of California announced the tentative results of a conference at Sacramento which he had had with General DeWitt, Thomas C. Clark and other officials of the Army and the Department of Justice. The Governor indicated that the conferees wished to avoid "the extreme action of removing all adult Japanese to and concentrating them in the interior of the United States for the duration of the war."[265] In other words, on February 2, General DeWitt *did not assert that military necessity required the removal from the West Coast even of the enemy aliens.* A few days later, by some stroke of military insight, he had discovered a "military necessity" that demanded the mass evacuation of citizens as well as aliens!

On February 3, 1942, too, Senator Downey of California spoke over the N. B. C. network in defense of Japa-

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[264] *San Francisco Chronicle*, San Francisco, California, February 6, 1942.

[265] *New York Times*, February 3, 1942. (Special dispatch of Lawrence Davies from San Francisco, February 2, 1942.)

nese residents of his State. That he did not then believe the rights of citizens were even endangered is shown by the fact that he spoke entirely about the care that should be exercised toward the alien Japanese. He described these older people as "desperately anxious to keep out of trouble and to abide by our laws" and he told his hearers, "Since the start of the war, so far as we know, they have engaged in no destructive acts whatever."[266]

At this time, Thomas C. Clark, co-ordinator of enemy alien control for the Far West, revealed to the press something of the subject matter of the meeting he had had with Governor Olson and General DeWitt at Sacramento. He declared that no mass ousting of Japanese aliens was being planned from the Pacific Coast war zone but that serious study was being given to a proposal to establish thousands of nationals of Japan, Germany and Italy in inland farm colonies.[267]

Thus we see that in early February, before he succumbed to the suggestions of the vocal anti-Oriental West Coast political and race conscious bloc, General DeWitt was thinking in terms, not of Japanese alone, but of *all* enemy aliens; and had not arrived at the point of planning any abridgment of citizenship rights.

By February 6, Mayor Fletcher Bowron had been won over to the cause of exclusion, but Governor Olson, according to a special dispatch to the New York Times, "described himself as opposed to mass evacuation of all persons of Japanese ancestry."[268] On February 9, Mr.

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[266] *California Daily News (Kashu Mainichi)*, February 4, 1942.

[267] *New York Times*, February 4, 1942. (Special dispatch of Lawrence Davies from San Francisco, February 3, 1942.)

[268] *New York Times*, February 7, 1942. (Special dispatch of Lawrence Davies from San Francisco, February 6, 1942.)

Olson was still advocating individual treatment for "Japanese in California." Declared the Governor, "It is easy for our people to be overcome with hysteria and to undertake unwise measures to insure our defense. Instead we must try to get the active and voluntary co-operation of the Japanese to avoid regimentation."[269] Governor Olson was in constant touch with General DeWitt during this period. It is therefore apparent that the General had not yet decided upon a "military necessity" demanding mass evacuation.

Meanwhile the signs of a substantial amount of public good-will continued. In Seattle, Washington, on February 9, 1942, the City's No. 1 American Legion Post announced that it would sponsor a boy scout troop composed entirely of American boys of Japanese ancestry.[270] On February 11, 1942, the Los Angeles C. I. O. Industrial Union Council sent a resolution to the County Board of Supervisors protesting the elimination of Japanese-American civil service employees from city and state jobs.[271] On February 20 the *California Daily Bruin*, the newspaper of the Los Angeles branch of the University of California, published a strong editorial castigating Mayor Bowron for his demand that "the Japanese, both alien and American-born, must go."[272]

On February 21, 23, 26, 28, and March 2, 6, 7, 12, 1942, the Select Committee Investigating National Defense Migration of the House of Representatives (Tolan Committee) met in Los Angeles, San Francisco, Portland

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[269] *California Daily News*, February 9, 1942.

[270] *Idem.*

[271] *Los Angeles Japanese Daily News (Rafu Shimpo)*, February 11, 1942.

[272] *Quoted from California Daily News*, February 21, 1942.

and Seattle to hold hearings on the "Problems of evacuation of enemy aliens and others from prohibited military zones."[273] These hearings were originally supposed to shed light on the proper course to take. But since General DeWitt had already requested and received authority to proceed with mass evacuation *before* the hearings began they turned into an uninspired attempt to justify what had already been decided. Yet at these hearings there was still a heartening amount of protest by the best type of people of every West Coast community against discriminatory and mass evacuation.

The representative of the California State Industrial Union Council, for instance, said:

> "We feel, however, that a good deal of this problem has gotten out of hand, Mr. Tolan, inasmuch as both the local and State authorities, instead of becoming bastions of defense of democracy and justice, joined the wolf pack when the cry came out 'Let's get the yellow menace.' . . . I am referring here particularly to the attack against the native-born Japanese, an attack which, as far as we can find out, was whipped up . . . Well, the result is that during this present situation local autthorities simply ran out on the problem . . . frankly, I think the only people who have shown a semblance of decency and honesty and forthrightness in this whole situation are the second-generation Japanese . . ."[274]

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[273] These Hearings were printed in full for the use of the *Select Committee Investigating National Defense Migration, House of Representatives, Seventy-Seventh Congress, Second Session, Pursuant to H. Res. 113* and appear as Parts 29, 30, and 31 of the National Defense Migration Series. United States Government Printing Office, Washington, 1942.

[274] Hearings before the *Select Committee Investigating National Defense Migration* (Tolan Committee), Part 29, San Francisco, Testimony of Louis Goldblatt, February 23, 1942, p. 11179.

Galen M. Fisher, advisor to the Institute of Pacific Relations and Secretary to the Committee on National Security and Fair Play saw no need for mass evacuation based on "protective custody," because, as he stated on behalf of the organizations he represented:

> "All the organs of public influence and information—press, pulpit, school, welfare agencies, radio, and cinema—have discouraged mob violence and have pleaded for tolerance and justice for all law-abiding residents of whatever race. Governor Olson and Attorney-General Biddle have issued proclamations to the same end."[275]

Clarence E. Rust, distinguished attorney of Oakland, California said pointedly:

> "I find no popular demand for the efforts to drive the so-called alien enemies from California. (Chester Rowell has also stated this as his impression.) The clamor seems to come from chambers of commerce, Associated Farmers, and the newspapers notorious as spokesmen for reactionary interests. In view of this fact, effort should be made to determine whether there is any connection between the clamor for the dispossession of the Japanese farmers and the desire of these clamoring interests to get possession of the Japanese farms and the elimination of the Japanese competition.
>
> "I am utterly in opposition to the adoption of a program of hysteria as a national policy. Our country is strong and virile because its citizenship emerged from the fittest survival of the melting pot. We reject the European and Asiatic doctrine of the attainder of blood . . ."[276]

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[275] *Ibid.*, Statement by Galen M. Fisher, February 23, 1942, p. 11200.

[276] *Ibid.*, Exhibit 9. Statement by Clarence E. Rust, February 23, 1942, p. 11254.

Washington's Governor Langlie denied that there was any intense feeling against persons of Japanese ancestry in his State. Instead he gave it as his opinion that "the people of Washington have been rather sane about this thing . . . . there has been very little difficulty. Aliens and Japanese have been treated rather kindly."[277]

On February 28, Mayor Harry P. Cain of Tacoma, Washington could speak out publicly against mass evacuation, he told the Committee:

> "America has always been interested in selection, and I feel it would be preferable to make careful selection of those to be evacuated, rather than just say 'Let's get rid of our problem by the easiest, most obvious way, of moving everybody out.'"[278]

Orville E. Robertson, Executive Secretary of the Family Society of Seattle, spoke for the social work agencies of the area. He asserted:

> "My own opinion is that wholesale evacuation is not necessary nor desirable . . . Unquestionably there are suspicious characters in all groups of our population . . . I think, however, that it is a good deal easier to spot and pick up, if need be, the questionable character in the Japanese group in a location where he is known, . . . than if you scattered them in a large-scale evacuation program."[279]

And Mr. Robertson left a prepared statement with the Committee which emphasized this theme: "Because in America we believe that the individual is important, . . .

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[277] Hearings before the *Select Committee Investigating National Defense Migration* (Tolan Committee), Part 30, Portland and Seattle, Testimony of Governor Arthur B. Langlie, February 28, 1942, p. 11402.

[278] *Ibid*., Testimony of Mayor Harry P. Cain, February 28, 1942, p. 11414.

[279] *Ibid*., Testimony of Orville E. Robertson, February 28, 1942, p. 11488.

we would urge that the problem of evacuation be individualized so far as possible."[280]

The representative of the Seattle Council of Churches, too, protested against the misrepresentation of public sentiment. He said:

> "We do believe that the continued good fellowship, participation between groups here in the city, and continued support of Japanese business, is an indication of the fact that there is much more good will toward the Japanese in the general community than is indicated by many of the reports."[281]

The Seattle Council of Churches also left with the Committee a prepared statement in which it said:

> "The committee is disturbed by the isolation of the question of evacuation to the Japanese, with little or no comment regarding aliens of Germany or Italy. This seems to indicate definite race prejudice on the part of the groups who are most conspicuous for their endorsement of evacuation. We are quite certain that the people at large, regardless of their fears, do not bear the same feeling of race discrimination. The continued patronage of the Japanese people, the friendly demonstrations which have taken place during the last 2 months between Japanese aliens and citizen groups in various churches and other civic organizations, and the absence of disorder and outbreaks are, we think, conclusive proof that public opinion at large is not represented by statements from the protesting groups."[282]

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[280] *Ibid.*, Statement by Orville E. Robertson, February 28, 1942, p. 11485.

[281] *Ibid.*, Testimony of Rev. Harold V. Jensen, March 2, 1942, p. 11568.

[282] *Ibid.*, Statement by the Council of Churches Emergency Committee on Aliens presented by Dr. Harold V. Jensen, March 2, 1942, p. 11564.

A prominent Yakima Valley farmer, a member of the school board of his district for twelve years, submitted this statement:

> "Records show that the Japanese students are very bright and industrious. Almost all Japanese children in the valley finish high school and many attend universities and colleges. There is almost no juvenile delinquency among them. My contact with the Japanese has proved to me that they are good citizens of the United States. They have very good morals; they are hardworking, thrifty, law abiding, anxious to contribute to national and community enterprises and to charitable work . . . I know a good many young Japanese born here, and I know that they feel that this is their country; they have no other; and they wish to do what they can to defend it . . . I think it is a mistake and unnecessary to evacuate the Japanese."[283]

Another witness from this district, a woman who has been an officer of many civic organizations, gave eloquent, similar testimony:

> ". . . I have lived in the Yakima Valley for 17 years. I have come to know the Japanese there very well. I have visited them in their homes. Some of them have been in my home as welcome guests.
>
> "We have in our community a good many Japanese truck farmers—people who came to our land to establish their homes 25 and 35 years ago, whose children were born here and have been educated with our children in our public schools. They have been brilliant students and we have perhaps envied them their capa-

283 *Ibid.*, Statement by Dan McDonald, March 2, 1942, p. 11583.

bilities or their perseverance in developing them. The parents were never permitted to become citizens, and now we call them aliens, but their children are American citizens even as we are. Many of them are in the Army. The parents have given their children willingly and proudly for the service of our country. Those at home want to do whatever they can to best help our country. The funds of the Red Cross in our section have been greatly augmented by the voluntary contributions of the Japanese. They would increase these donations still more if they were allowed to give a benefit dance, but they dare not have group meetings.

"Since the war began our local Japanese have done everything in their power to cooperate with our Government. They have willingly turned in whatever the Government has asked for. Now all they ask is the privilege of getting into their fields and producing as only they can, the crops which this country needs to feed its Army and its civilian population. These people are farmers, they are not saboteurs. If you knew them personally as I do, you would realize that. Since you do not, I can only ask you to use your intelligence. Will a man who is exhausted from long, hard labor in the fields—labor begun at 4 in the morning and continued until dark—will such a man have any energy left for espionage work? No. As I say, these people are farmers; they know it is time to plant their crops—the earth is calling to them, and in spite of the dreadful uncertainty, in spite of the fact that the banks will give them no crop loans as they have in the past, these people are bravely beginning their plantings."[284]

[284] *Ibid.*, Statement by Esther S. Boyd, March 2, 1942, pp. 11583-11584.

An interesting commentary came also from a Chinese patriot and scholar, now associated with the University of Washington:

"I am a citizen of the Republic of China. I was born and brought up there. I was formerly assistant professor at the University of Amoy in South China and now I am teaching at the University of Washington.

"During my travels in Free China between 1939-41, I found that the leaders in Chungking were very farsighted in having adopted the policy of inculcating in the minds of the Chinese masses discrimination between the Japanese warlords and the Japanese people. Since the surprise attack on Pearl Harbor, I have been watching closely the general policy of the Government of the United States toward the Japanese aliens and the American-born Japanese. That was why I went to the public hearings on alien evacuation at the county-city building this morning.

"If the people here are not afraid of the thousands of German and Italian aliens in their midst, there is no reason why they should be afraid of the Japanese now that all the suspicious characters have been interned. As a matter of common sense, the physical traits of the Japanese are more easily identifiable than those of the Germans and the Italians, and, therefore, more effective precautionary measures can be adopted to keep the Japanese from undertaking activities inimical to the interests of this country.

"Of course, the American people out here may be concerned over the possibility of a Japanese invasion on the Pacific coast. But the removal of the Japanese alone will by no means eliminate all the fifth-column activities from this area. Here again a few Germans or Italians, with the advantage of their un-

identifiability, may give greater assistance to the invaders than the entire Japanese population who, under the present circumstances, will find it extremely difficult to gain access to any militarized zone or war plant, and who, in time of emergency, can easily be rounded up at a moment's notice."[285]

The statement of E. W. Thompson is that of a man who ad intimate knowledge of the situation:

"I take the liberty of presenting a few facts because I am one of the pastors of a Japanese church in Seattle (Methodist) and am in daily contact, not only with the young people, who are Americans but with their parents who are technically Japanese. I have genuine contacts with these latter because I have some knowledge of the Japanese language and can talk directly with them.

". . . Those who came 15, 20, 30, or 40 years ago have become strangers to the land of their birth. They have become warmly appreciative of the land of their adoption; they recognize the superiority of our democratic ideals and customs. They have raised their children here. Nearly all of them would be citizens if they were permitted. When some of these have taken trips to Japan, even in peacetimes, they have been under suspicion and strict surveillance in Japan because of their obvious American sympathies and interests. They belong to us.

"In Seattle and vicinity, where I am acquainted, a significantly large proportion of these Japan-born Americans have a major part of their business dealings with their English-speaking neighbors, so that

[285] *Ibid.*, Statement by Cheng-Kun Cheng, March 2, 1942, pp. 11606-11607.

they have built themselves into the economic structure of the city and the State . . .

"Any large-scale removal of these economically well-rooted Japanese-Americans would have a disastrous effect upon them. You can move a family several hundred miles quite easily, but you cannot move a grocery or farm or hotel, much less the business good-will which is its mainstay. These people have struggled for from 15 to 35 years to make themselves a part of the American community. Mass evacuation would destroy the painstaking achievements of these years. Mass evacuation would mean snatching from them what they cannot regain save by another long period of struggle in a new community.

"After checking various wild rumors, I have yet to hear of a single act of sabotage which can be laid to our fellow countrymen of Japanese origin . . .

"And we can count on the efficiency of our Federal Bureau of Investigation to continue to round up such individuals as are subject to suspicion. Strict curfew laws and constant Federal Bureau of Investigation surveillance, if these are necessary, would be far less destructive of economic and community life of Americans and Japanese alike than mass evacuation.

"So it is my earnest hope that you will feel justified in recommending evacuation only in such strictly limited areas as military needs may require."[286]

On March 2 a woman with a command of the Japanese language who had been living and working among the Japanese of Gresham, Oregon, asked the Tolan Committee some incisive questions:

"In Gresham, I find farmers on 67 farms, living there from 20 to 40 years continuously, some of them

[286] *Ibid*, Statement by E. W. Thompson, pp. 11607, 11608, 11609.

on the same farms for almost that length of time. I find one family for 50 years in this locality. They were married 50 years ago here. These are law-abiding, upright people of our community. What is it that makes it necessary for them to evacuate? Have they done anything? Is there anything in their history in this area to justify such a fear of them developing overnight?"[287]

As late as March 6, 1942, the Los Angeles County Chapter of the American Association of Social Workers protested to the Tolan Committee, "We feel that the forced mass evacuation of aliens and citizens on a racial or national group basis would militate against the principles for which our country is waging war against the forces of tyranny and intolerance."[288]

It was not only before the Tolan Committee that protests against mass evacuation were registered by public spirited citizens. On March 2, the Pasadena Committee on Fair Play, which included as members such distinguished persons as Nobel Prize winner Robert A. Millikin, still urged:

". . . that to protect the long-range values involved, we hope that all restrictions on freedom of movement and permits to remain in a given area may be based on considerations of safety to this country and not on the question of political, religious or racial backgrounds."[289]

The Southern California branch of the American Civil Liberties Union reacted, too, against the discriminatory

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[287] *Ibid.*, Testimony of A. E. Peet, p. 11386.

[288] *Ibid.*, Statement by the Executive Committee of the Los Angeles Chapter of the American Association of Social Workers, p. 11872.

[289] *California Daily News*, March 2, 1942.

nature of General DeWitt's first proclamations. "The orders are far too sweeping to meet any proven need and should be modified to provide examinations, with hearings, for all citizens excluded from the designated areas," its chairman asserted.[290]

That famed observer, Louis Fischer, could not find the public animosity against persons of Japanese ancestry which pressure groups claimed existed. On March 7, 1942, he published an article in which he described a West Coast journey he had just concluded:

> "In Seattle I saw a girl's school going on an excursion, and smiling Japanese children were walking hand-in-hand and arm-in-arm with American children. Teachers and superintendents in liberal Pasadena and Seattle told me that the Japanese students were often brilliant and always loyal. Numerous housewives told me they trust their Japanese servants. The public is not showing hate or spite. But the reactionary press and the politicians are out for blood and wholesale internment. Jingoes are endeavoring, under the cover of war-time flag-waving patriotism, to do what they always wanted to do in peace time: get rid of the Japanese . . . ."[291]

On March 11, the *Christian Century*, in an editorial titled "Hitlerism Threatens the California Japanese," pleaded that there should not be:

> "(1) action based on unproved rumor; (2) action which flouts the constitutional rights of the large number of second-generation Japanese who are United States citizens; (3) action whose real end is the

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[290] *California Daily News*, March 5, 1942.

[291] Louis Fischer, "West Coast Perspective," *The Nation*, March 7, 1942, pp. 267-77.

destruction of Japanese competitors of American firms; (4) action which is nothing of frustration at the way the war is going."[292]

By March 19 the Tolan Committee had scanned its hearings and issued its first report.[293] In it it had to admit that during the earliest stages of the war, when the United States and the coast appeared most vulnerable, there was no call for evacuation:

> "For at least a month there after (after the outbreak of war), however, the temper of the American people remained relatively calm toward these groups in their midst.
>
> "Meanwhile the Federal Bureau of Investigation was active in rounding up those enemy aliens (German, Italian, and Japanese) considered most immediately dangerous. These raids were made with the aid of information supplied by the military and naval intelligence services, and often with the collaboration of local police officials. Editorial comment praised these preventive measures, and there appeared no widespread demand for wholesale evacuation."[293]

Every informed source agrees that whatever public ill-will eventually arose was late in manifesting itself and was artificially stimulated. Charles Inglehart, who was in close touch with the situation during this period, wrote on June 6, 1942:

> "This action has since been defended on the ground that the Japanese themselves were in danger. I talked with a good many people of all sorts and found no

[292] "Hitlerism Threatens the California Japanese," *Christian Century*, March 11, 1942, p. 309.

[293] *Tolan Committee Report* of March, 1942, p. 2.

evidence of any serious danger. Nor could I discover a single case of subversive activity, though the air was filled with unsubstantiated rumors. A minority group always has a grapevine which carries news with uncanny speed and accuracy, but no Japanese whom I met had heard of more than three instances of violence resulting in death, and all of these were said to have been the work of Filipinos.

"I cannot escape the conclusion that even as a war measure evacuation was unnecessary. The slumbering embers of public antagonism to this alien group were, it appears, deliberately fanned by interested persons and organizations until a conflagration was threatened, but at any time it could have been quenched if the authorities had shown the proper firmness."[294]

Even after evacuation orders were an ugly reality and those minuscule minds who always seek to foster some popular crusade against a minority had begun their chorus of hate, the very best elements of the West Coast communities continued to show their friendship for their neighbors of Japanese ancestry. Galen Fisher describes some of this activity:

"Local committees arranged to store belongings for the duration; they formed in Los Angeles a corporation to administer properties; in Berkeley, they ran a sale of art works by a Japanese professor, the proceeds to be given to establish a scholarship in the University of California for worthy students who had suffered from the war; they set up a clinic staffed by Japanese doctors and nurses to give anti-typhoid inoculations lest mothers with children be prostrated

[294]Charles Iglehart, "Citizens Behind Barbed Wire," *The Nation*, June 6, 1942, p. 649.

if they had to undergo two other injections upon arrival at a Center. These friendly efforts came to a climax during the last days of registration and departure. Beginning with the First Congregational Church of Berkeley, church plants were offered to the Army as evacuation stations. Groups of church women were on hand to provide a creche for the children of mothers while they registered, to taxi registrants from home to station, to talk with those who were waiting, and to serve tea and sandwiches, or even a tasty breakfast the day they left.

"When the big buses or the long trains filled with outwardly smiling faces rolled off for the Assembly Centers, they were bidden au revoir by loyal friends from the churches and schools, or by fellow students, as at Pomona College."[295]

An episode mentioned in Mr. Fisher's account is given greater detail in the newspaper of the town in which occurred:

"So popular that the entire student body turned out with the band to see her off when the evacuation order came, Miss Hisanaga has two brothers, Sergeant Bennie Hisanaga, former football captain at Pomona, and Kazuma Hisanaga, in the United States Army."[296]

One young man of Japanese ancestry thought that he d his fellow victims were being accorded the best treatnt of any evacuees on the coast, for he wrote:

"During this hour of uncertainty when trouble seems to embroil all of us, the Japanese of Santa

[295]Galen M. Fisher, "The Drama of Japanese Evacuation," in *A Touchne of Democracy*, published by the Council for Social Action of the ngregational Christian Churches, New York City, October, 1942, p. 18.

[296]*Claremont Courier*, February 26, 1943.

Barbara are proud to say that we have many Americans in our community that have been more friendly to us than at any time in the past.

"Instead of trying to make moves to have us all removed immediately, many have come to us and offered their sincerest sympathy. Personally, all of us in Santa Barbara think we have had finer treatment from our American friends than in any other city."[297]

But identical attitudes were being expressed elsewhere, as this excerpt indicates:

"A school teacher in Pasadena, who had a large number of Japanese children in her school, writes: 'Last week our Japanese all left. Most of them went to Tulare. Their trains were parked just a few blocks from our school, so I went over one morning to see them leave and say good-bye. Most of the women and girls had been crying, but they were smiling and self-controlled. It was all very sad. So many personal tragedies are tied up with these national necessities. Different church groups and friends served coffee and milk and sandwiches, and everyone was friendly and kind. One Japanese lady said to me: 'Oh, I think the people of Pasadena are the best people on earth. We shall always remember their kindness during these sad months.' How we miss the little Japanese children at school. They all brought us bouquets and gifts of thanks from their parents.' "[298]

The pathetic attempt of organized Caucasian groups to preserve human values and amenities continued all through

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[297] *Los Angeles Japanese Daily News*, March 28, 1942

the Assembly Center period. On April 2, 1942, the Methodists of Bakersfield, sent this letter to the Wartime Civilian Control Administration:

> "Representing the First Methodist and Trinity Methodist churches of Bakersfield we have no hesitancy in placing this matter of greatest importance before you.
>
> "When evacuation of the Japanese is effected, we request that our Methodist Japanese church representing more than twenty families, be moved as a unit.
>
> "For many years the Methodist church has worked for the development of Christian character and good citizenship among the Japanese families of this community. The values created in this fellowship may be conserved, we are sure, if this Christian group may be resettled together."[299]

The artificiality and lack of genuine public interest in a mass evacuation of persons of Japanese ancestry is demonstrated by an incident which occurred in early July Many evacuees were then at temporary Assembly points, awaiting removal to inland Relocation Centers. Those being held in Fresno and Tulare counties of California were scheduled to leave July 15. The agricultural interests of these districts, particularly the fruit and vegetable growers of the San Joaquin Valley brought pressure on Governor Olson to request that the evacuation be halted to permit the "Japanese to help in the harvest." A critical farm labor shortage had developed and the growers had re-discovered that "the overwhelming majority of Japanese farm workers are as loyal as you and I, and the best farm workers you can get."[300] On July 3, 1942, Gov-

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[299] *Los Angeles Japanese Daily News*, April 2, 1942.

ernor Olson spoke over a state-wide radio chain and announced that he would ask for a delay in evacuation to permit the use of the labor supply.[301] On July 6 the Governor advised the press that he would carry his request to General DeWitt and War Relocation Authority heads.[302] On July 8 Mr. Olson had to report that General DeWitt had vetoed his proposal. The General had responded that the Governor's request "would require an entire change of program which had been adopted as a military necessity."[303] This was, incidentally a full month after the battle of Midway had eliminated any direct threat to the West Coast.

We have gone into some detail to refute the smug, hyprocritical and dangerous doctrine of protective custody particlarly because we are certain that it is evacuation which breeds violence and disorder and which will continue to do so as long as it is upheld. The Americans of Japanese ancestry knew where they were safest. One of them, when a member of the Tolan Committee began to talk in terms of safety, answered:

> "I was born in Alameda County some 33 years ago. I went to grammar school in Alameda County; I went to high school in Los Angeles County, and graduated at college here. By and large I would rather depend upon my friends here, upon the people I have known for 30 years, rather than to risk evacuation . . . Personally I don't fear for my safety here among Californians who know us, who have seen many Japanese and who would not fee

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[301] *Los Angeles Times*, July 3, 1942.

[302] *New York Times*, July 7, 1942. (Special dispatch from San Francisco, July 6.) *Los Angeles Times*, July 7, 1942.

[303] *New York Times*, July 9, 1942; *Los Angeles Times*, July 9, 1942; *Los Angeles Daily News*, July 9, 1942.

> that an imperial army representative arrived every time they saw a strange face. I also feel that the average human being in Los Angeles County is to be depended upon. I haven't lost entire faith in the human beings here . . . .[304]

Statistics bear out this young man's conviction that his person was in no immediate danger. In the year 1941, which included the three weeks which followed the Pearl Harbor attack, no person of Japanese ancestry died by homicide.[305] It was the suicide rate that rose during this year from the 1940 total.[306] In the entire calendar year 1942 (and persons of Japanese ancestry were at their usual addresses on the West Coast for an average of half of this year) no person of Japanese ancestry died by homicide in the States of Oregon, Washington or Arizona.[307] A total of seven deaths by homicide are registered for California.[308] But most of these were the result, not of a delay in evacuation, but *of the fact of evacuation.* At the Manzanar Relocation Center in California, for instance, on December 6, 1942, two evacuees, one a school-boy eighteen years of age, were slain in a disturbance growing from the bitterness and frustration of evacuation and confinement, under guard, behind barbed wire.

To brand people undesirable and dangerous in one locality is to invite suspicion and hostility against them when they move to another. When an acknowledged liberal

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[304] *Hearings before the Select Committee Investigating National Defense Migration* (Tolan Committee), p. 11708.

[305] *Wartime Civil Control Administration Bulletin 12*, March 15, 1943, p. 154.

[306] *Idem.*

[307] *Wartime Civil Control Administration Bulletin 12*, p. 153.

[308] *Idem.*

such as Mayor La Guardia of New York declares that people who have had to be banished from some other area should not be allowed to enter the City which he governs, the interpretation placed upon evacuation by the uneducated and the unthinking can well be imagined.[309] And to dispossess a people, to allow their homes, their farms, their businesses and their equipment to fall into other hands at terms dictated by panic, is to create vested interests determined to prevent their return and dedicated to turning public temper against them to the point of violence.[310] The relocation centers are regularly termed "prison camps" or "internment camps" by politicians and by dealers in national division. If this continues, and unless evacuation is successfully challenged in the Courts, it will be an almost hopeless task to rehabilitate evacuees in their own eyes and in the eyes of the American people.

To summarize, there was a tremendous fund of good will and determination to avoid excesses and un-American procedures at the beginning of the war. Much of it was evident on the West Coast, and it came from a large and important section of the population. This spirit of fair play, instead of being fostered and nourished was ignored, discouraged and squandered by General DeWitt and the politicians by whom he was influenced. Unhappily these men yielded to an odious doctrine of needless protective custody which has left a train of unconstitutional edicts, violence and threats of future violence.

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[309] *New York Times*, April 27, 1944.

[310] For some instances of suicide, property damage, physical violence, and threats of physical violence directly traceable to evacuation see the *Christian Century*, April 26, 1944, p. 516; *The Salt Lake Tribune*, Oct. 7, 1943; *The Salt Lake Telegram*, Oct. 6, 1943; *Pacific Citizen*, June 18, July 16, Sept. 4, Oct. 22, Nov. 19, Dec. 3, Dec. 31, 1942; Feb. 4, April 15, July 31, Oct. 9, Nov. 27, Dec. 18, 1943; June 3, Aug. 12, 1944.

11. Contrary to Unsubstantiated Assumptions and Assertions, Americans of Japanese Ancestry Are Well Assimilated and Loyal. Abundant and Reliable Information Was on Hand to Prove This at the Time of Evacuation.

Since Americans of Japanese ancestry have been treated differently from all other citizens, those who favor this discriminatory treatment and those who uphold it are logically forced to assert or to assume that these young people are in fact different from all other elements of our population. And since variations of race or physical type are not legitimate grounds for discriminatory treatment under our Constitution, they must argue that the differences are social or cultural as well as biological. The racists and divisionists among us do not hesitate to use this argument. They are eager to convince the country that those who are physically distinct from the majority are also separate in customs and mentality, and therefore should be barred from coming to our shores or eliminated if they are already here. But it is a dark day for liberty when this doctrine of vast social and psychological gulfs between groups in our population becomes dignified and implemented by favorable mention in the decisions of this Court. Persecution has become so common in our day and the rationalizations for persecution so specious that the grounds on the basis of which discrimination against any group of citizens is urged should be weighted on the most sensitive scales of justice that free men can devise. If this Court upholds discriminatory treatment of certain citizens on the basis of "ethnic affiliations" with an enemy of our country, its thrice solemn responsibility is to ascertain that so serious a contention is actually true and is not asserted merely because it is the only legally support-

able assumption that will excuse what was done in haste and folly.

The credo of democracy is that men of all races, colors and faiths can be molded to common ideals and a common national devotion by the institutions which they inherit and share. The alacrity with which a General, some politicians and some Judges are ready, in spite of a rich store of reassuring evidence, to abandon this conception for the assumption that our young people are motivated, not by the social dynamics and values of America, not by her schools, churches, and athletic fields, but by considerations of race or dim parental memories of a distant land, is grim and disillusioning indeed.

Every argument for evacuation expresses or implies the conviction that Americans of Japanese ancestry are not assimilated into American life and therefore could not be expected to be as loyal and devoted as other elements of the population. Those who advance these arguments ordinarily know very little about culture, about assimilation, or about Americans of Japanese ancestry. They always confuse the concept of "intermingling," with the concept of "assimilation." The Negroes of Harlem participate in American culture. Certainly they have no knowledge of the African tribal life of their remote ancestors. They listen to, dance to, and create American music. They eat American-type foods. They speak English. In all important aspects of behavior they conform closely to common American standards. Yet they dwell by themselves in a special section of the city. In the same way, because of property restrictions, persons of Japanese ancestry often lived together in certain sections of West Coast cities. But this is no more reason than it is in the case of the Negro to assume that they were not there con-

forming to genuine American habits of thought and action. After all they were attending the same kind of American schools, they were listening to the same radio programs, they were singing the same popular tunes, and were using the same slang as were boys and girls who lived elsewhere. The 100th battalion and the 442nd battalion are formed almost entirely of Americans of Japanese ancestry. But this does not prevent them from facing America's enemies; wearing American uniforms, using American weapons and tactics, fighting America's fight and shedding American blood. The unrestricted intermingling of races and peoples may be an ideal in itself, but it is by no means necessary for assimilation. We protest against the narrow and superficial assumption which we find in every statement of General DeWitt and every brief of the Government on this subject, namely, that because people of Japanese ancestry lived together, they must have been carrying on mysterious and un-American customs of oriental origin.

In extenuation of his orders General DeWitt has called the persons whom he banished, most of them American citizens, "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion."[311] This theme he repeats over and over. In another place he says, "Because of the ties of race, the intense feeling of filial piety and the strong bonds of common tradition, culture and customs, this population presented a tightly-knit racial group." (*Final Report*: page 9.) Further on he returns to this refrain to state, "In his estimate of the situation, then, the Commanding General found a tightly-knit, unassimilated racial group, . . ." (*Final Report*: page 17.).

[311] *Final Report* of General DeWitt, p. vii.

General DeWitt is the author, or at least the popularizer of the most un-American slogan used in the United States during the present conflict, "A Jap's a Jap."[312] We know his opinion of Americans of Japanese ancestry. But what do those who are somewhat more qualified by training and contacts to speak on this subject, have to say? It is impossible to reconcile General DeWitt's dicta with this statement of Monroe E. Deutsch, Vice-President and Provost of the University of California:

> "As one who has lived almost all his life in California and has seen a great deal of the Japanese population, I feel able to express a considered judgment on them. I have never had occasion to doubt the loyalty of any of those with whom I have been in contact; I have found them hard working, devoted and law-abiding. On the Berkeley campus of the University of California we have had some four hundred American-Japanese; they have acquitted themselves well, not only in their studies, but in their conduct, also. It has been a joy to me to see how in the days preceding the war these students were accepted more and more as part of the student life on the campus."[313]

The General's view also seems to be diametrically opposed to that of so experienced and trustworthy a guide as Bishop Baker, who has written:

> "I have known intimately many Japanese-American citizens. I am proud of them as *fellow-citizens* and should count it a privilege to have them as my neigh-

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[312] "General DeWitt Reveals His Prejudice", (editorial), *Christian Century*, May 5, 1943, p. 532.

[313] Monroe E. Deutsch, letter of September 12, 1942, reprinted in the *Pacific Citizen*, November 19, 1942.

bors. They are persons of character and are devoted to the ideals of American democracy."[314]

In December, after the start of the conflict, Governor Olson saw no lack of loyalty or assimilation to disturb him, even among the aliens:

> "I have every confidence that the F.B.I. and other agencies are fully capable of handling the problems presented by the presence of disloyal persons, whether they be Japanese or Germans or Italians.
>
> "They have been watching these persons a long time; therefore they were ready to act promptly and effectively in the first few days of hostilities.
>
> "I am reminding the citizens of California that the vast majority of Japanese in California are native born American citizens and completely loyal to the government of the United States; also, that the non-citizen Japanese, for the most part, are likewise loyal and anxious to serve our country, although they themselves are not eligible for citizenship."[315]

Dr. Floyd Schmoe of the University of Washington, on the basis of rather substantial evidence, argues that the citizens were entering business and successfully into every aspect of American life and work:

> "Because they work hard and are serious they make good grades. Year in and year out a much larger percentage of the valedictorians and salutatorians of West Coast high schools are *nisei* students than the total percentage of such students would ever indicate. Many also are leader in student affairs, athletics, and other extracurricular activities.

[314] James Chamberlain Baker, Bishop of the Methodist Church of California, letter reprinted in the *Pacific Citizen*, Nov. 19, 1942.

[315] *Pacific Citizen*, January, 1942.

Since December 7th a *nisei* student was elected president of the student body of an Oregon high school. Last year in a Seattle high school a *nisei* girl held elective offices in seven different school organizations.

"At institutions of higher learning Japanese American students are equally quick to take advantage of the opportunities offered them. Although they come from an economic level appreciably lower than that of the white American students, a much higher percentage of them attend the universities and colleges. At the University of Washington in Seattle, where some eight thousand students are enrolled from a community of approximately half a million people, there are nearly four hundred *nisei* students from a Japanese community of about ten thousand—a ratio of three to one.

"Until recently more than one thousand held state civil service appointments. Capable Japanese lawyers, doctors, dentists, and optometrists are practicing in some twenty-five cities of the Pacific area. Every large educational institution on the West Coast and in Hawaii had Japanese professors and scientists on its staff. A few were employed by the Federal Government, and many were trusted executives of banks, transportation companies, and commercial firms. In Hawaii five members of the Territorial Legislature were Hawaiian Japanese."[316]

In the testimony before the Tolan Committee of Seattle's Mayor Earl Millikin; the DeWitt charges of poor citizenship are strangely absent:

"In the main, the American-born Japanese, and even the aliens, are fine, good citizens—hard work-

[316]Floyd W. Schmoe, "Japanese Americans and the Present Crisis,"

ing. They contribute nothing to our juvenile delinquency; they are out of our courts almost entirely; they are very fine citizenry. It is just a situation developed by Japan herself. . . ."[317]

A frank citizen who has had considerable experience with children of Japanese ancestry gives information which directly controverts the assertions of General DeWitt, moreover.

. "Now, as to these Japanese, I have had pretty close contact with them for the past 30 years, and I consider that they are loyal. If I and my son have to go across the water to fight—he is in his teens—I am not afraid of those boys failing to produce back on the soil, at the home place. As to students in our schools—I have been on the school board for years and have handled boys and worked in the Boy Scout group, and the Japanese boys in the Scout group have been excellent citizens. The girls and boys in the school have ranked above my child and most of her race, so far as scholarships went. I think that it would be safe to say that 75 percent on the honor roll are Japanese. Morally, the Japanese children rank—even outrank our white children. We have around 925 or something like that, in our valley, and the big share of them there are farmers."[318]

If the Americans of Japanese ancestry were as isolated and unassimilated as General DeWitt alleges, their Caucasian friends and class-mates were curiously unaware

[317] *Hearings before the Select Committee Investigating National Defense Migration* (Tolan Committee), p. 11405.

of it, as this eloquent statement of a University of Washington student representative attests:

> "I wish to testify to this committee in an unofficial capacity and merely as an individual student speaking for an informal group of students who feel that Japanese students should be allowed to continue their studies at the University of Washington and not be evacuated from the area. There are over 250 Japanese-Americans, 70 of them girls, who are at present studying at the university so as to prepare themselves to become useful American citizens. I know many of these students personally, am pleased to count some of them as my intimate friends, have gone to school with them, studied with them, participated in student activities with them, gone to the same parties, and visited their homes and so I feel at least partially qualified to speak in their behalf.
>
> "What are the Nisei students like? I am convinced that the majority of university students will agree with me when I say that the answer can be given in just one word—American. Aside from superficial differences of skin color, you would be unable to tell them from the average American college student. They dress the same, talk the same, and most importantly they think and believe the same. . . . " [319]

Another student, a young woman, gave similar convincing testimony:

> ". . . It has been said that these people are as dangerous to our country as if they had grown up in Japan. I do not believe this to be true, for they have learned our way of life and have grown up

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[319] *Ibid.*, p. 11590.

thinking of America as their country. They have learned our mores, often teaching their parents our traditions and customs. Even those who have visited Japan, just as many of us have visited the homes of our ancestors in England or Norway, have returned saying they could not agree with the Japanese philosophy of life, and were proud that America was their country.

"These students who have grown up loving America, unless ruthlessly treated, so that their ideals and faiths are considerably shaken, are not likely to change a life-time philosophy in the course of a few months. They are the first generation of Japanese-Americans born in this area, and the first really to learn our customs and language. They have learned more in school than book knowledge; they have learned the American way of doing things, and have taken it back to their parents. This assimilation process has been taking place for 20 years, and the new generation—the third-generation Japanese-Americans—is just beginning in the Seattle area. Must we spoil that long process now by prejudice and isolation?"[320]

The evidence introduced by an official of the University of Washington is shockingly at variance with the sweeping charges of General DeWitt:

"The second generation Japanese have made a good adjustment to the educational institutions in this area. At the University of Washington alone there are over 400 students from this group, and there are some 20 Nisei in the employ of the uni-

[320] *Ibid.*, p. 11591.

versity. One, a veteran of the first World War, is an assistant professor; another is an instructor in nursing; one each are associates in Far Eastern studies and sociology; five others are teaching fellows; and the rest hold research and clerical positions. Students of Japanese ancestry hold offices in student organizations, and represent the university in athletic and nonathletic competition.

"This opportunity to participate fully in campus life has resulted in the development of close ties between students of Japanese parentage and other undergraduates. When the Seattle public schools recently considered accepting the resignations of their Nisei employees, over a thousand university students of white parentage petitioned the board on behalf of the Americans of Japanese ancestry.

"So integrated are many of the campus Nisei that they refuse to celebrate the Japanese victories over China, and in a few cases American-Japanese even joined the boycott against shipping war supplies to Japan 2 years ago. . . .

"Objective standards for measuring loyalty are virtually impossible to set up. However, there are a number of overt reactions of the Nisei at the University of Washington which can be recorded. As the official in charge of recommending draft deferment in the college of arts and sciences, I have had the opportunity to interview hundreds of men regarding Selective Service. Last spring (before Pearl Harbor) I had noticed that practically none of the Americans of Japanese ancestry asked either for deferment or 'special' jobs. After the treacherous attack on Hawaii, over a dozen Nisei called in my office to find out how to volunteer to fight for the United States. In checking over the recent members

of the Japanese Students Club, I find 83 who have either volunteered or are serving under Selective Service in the American Army."[321]

Many more statements of prominent and informed Caucasians attesting to the achievements, the Americanism, the loyalty and the assimilation of citizens of Japanese ancestry could be introduced, but perhaps a sufficient number have been presented to establish that every trained, competent and impartial witness directly challenges the basic assumption upon which the General ordered evacuation.

If assimilation means anything it connotes participating in and contributing to the intellectual, artistic and recreational life of the society of which one is a part. And when a person's achievements and contributions along these lines are recognized and rewarded, despite the fact that he is of a minority group and is distinct in a physical sense, assimilation can be said to be complete. Let us apply this standard to Americans of Japanese ancestry whom General DeWitt decided to evacuate because he considered them to be unassimilated.

In February, 1942, *after* the beginning of the war, four nisei girls were elected to offices in the honor-scholarship society of a large Los Angeles high school. One of them was named the school's representative to the city's second annual Youth Conference.[322] In March, 1942, two nisei girls who were attending Hollywood High School not only received recognition for outstanding

[321] *Ibid.*, pp. 11598-11599.

[322] *California Daily News*, February 26, 1942.

scholarship but were elected to the school's Citizenship Honorary Society.[323] Perhaps this is the answer of the young people of Hollywood, California to the absurdities of General DeWitt and his kind. Two young people of Japanese ancestry also received scholarship recognition at the Los Angeles City College.[324] In May the person who had been voted the most distinguished student in the 1942 graduating class and who had been awarded the University Medal for highest scholastic standing, Harvey Itano, was not at the University of California Graduation exercises.[325] General DeWitt, who looks in strange places for the enemies of this nation, had discovered him to be unassimilated and to be a member of a "close-knit racial group" and had ordered him from the area! In June, 1942, a nisei boy was nominated for the office of president of the student body at Lincoln Junior High School in Salt Lake City. Though he seemed assured of election he withdrew from the contest.[326] Honors and awards earned by 22 nisei students were announced at the University of Washington in June. Of these four were Phi Beta Kappa memberships and two were memberships in Sigma Xi.[327] Many other high school and college students of Japanese ancestry were honored by election to class offices, and by awards at this time.[328] At Tacoma, Washington in late June, the Berkeley episode was repeated. When nearly 700 students graduated from

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[323] *Ibid*, March 18, 1942.

[324] *Los Angeles Japanese Daily News*, March 30, 1942.

[325] *Los Angeles Times*, May 14, 1942; *Pacific Citizen*, July 9, 1942.

[326] *Pacific Citizen*, June 4, 1942.

[327] *Ibid*.

the Lincoln High School the prize for highest scholarship had to be awarded in absentia. The recipient, whom General DeWitt had singled out for attention according to other criteria, was behind barbed wire and under armed guard.[329]

In 1943 and 1944 citizens of Japanese ancestry, driven from California schools by General DeWitt's decrees, began to find havens in colleges elsewhere. It did not take the vital and observant young people of this country long to appraise the newcomers and to thoroughly discredit the General's judgment.

Kenji Okuda was soon elected president of the student council at Oberlin College in Ohio.[330] Paul Tani was elected president of his class at Heidelberg College.[331] William Marutani, Masamori Kojima and Thomas Hayashi were honored by class presidencies at South Dakota Wesleyan, Haverford and Bard College respectively.[332] At South Dakota Wesleyan, too, Oliver Takaichi came out best in a selection based on scholarship, personality and participation in school activities.[333] Girls have been honored with class offices as well. For example, Naomi Nakano was chosen vice-president of the graduating class of the University of Pennsylvania.[334] At least fourteen other nisei have been elected class officers in colleges over the country. And the recognition is by no means limited

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[329] *Ibid.*, June 25, 1942.

[330] *Time Magazine*, June 21, 1943; pp. 46; *Pacific Citizen*, April 1, 1942.

[331] *Pacific Citizen*, October 16, 1943.

[332] Information from circulars and letters of the National Student Relocation Council, 1201 Chestnut Street, Philadelphia, Penn.

[333] *Pacific Citizen*, July 15, 1944.

to political office. At Baylor University in Texas Miss Toyoko Hayashi was voted "Most Popular Girl" and Queen of the Junior Prom.[335] The list of fellowships, scholarships and other honors, many of them elective, which have come in war-time America to these strange representatives of a "close-knit racial group" is a long one and has only been suggested by what has been given.[336]

The contributions of persons of Japanese ancestry to the graphic and fine arts brought some embarrassing moments at evacuation time. The winner of Seattle's annual traffic safety poster contest won a cash reward and a set of encyclopedia for his school. But he no longer could attend the school and the cash award had to be delivered to him at an assembly center.[337] At the very time that the famous sculptor and onetime Guggenheim Fellow, Isamu Noguchi, was evacuated to Poston, his work was being placed on exhibit at the San Francisco Museum.[338] The work of Chiura Obata, noted artist and long a faculty member of the University of California was on exhibit at Mills College in Oakland in July of 1942. This American artist, however, was in detention.[339] In the spring of 1943 the watercolors of Henry Fukuhara were receiving favorable notice at an exhibition at the Otis Art Institute in Los Angeles. The artist, however, was confined in the Manzanar Relocation Center.[340] Other

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[335]Information from circular of the National Student Relocation Council.

[336]*St. Louis Post Dispatch*, Dec. 2, 1943; *Pacific Citizen*, Mar. 11, May 6, June 3, June 17, Oct. 2, Oct. 9, Nov. 13, 1943; April 22, May 6, May 13, May 20, May 27, June 3, June 10, June 17, July 8, July 15, Sept. 2, 1944.

[337]*Pacific Citizen*, June 4, 1942.

[338]*Interpreter Releases*, Vol. IX, No. 35, July 16, 1942.

painters of Japanese descent, most of them American citizens, who have been and continue to be a vital force in the art of this country are Mitsu Iwamatsu, Teru Masumoto, Chuzo Tomotsu, Taro Yashima, Robert Kuwahara, Sueo Serisawa, Kenneth Nishi, Henry Sugimoto, Shizu Matsuda, and, best known of all, Yasuo Kuniyoshi.[341] Many of these artists have been violently anti-Fascist. Kuniyoshi broadcasts to Japan and paints anti-Axis posters for our government. The proceeds of an exhibit of his work went to United China Relief.[342] Chuzo Tamotsu was selling paintings for the relief of the free Chinese long before Pearl Harbor.[343] Kenneth Nishi, who was evacuated from California, is now a Corporal in the United States army as well as a promising young American artist.[344] Of such as these does General DeWitt's unassimiliated group consist!

In the field of music there is Lewis Izumi who was a piano soloist with the Los Angeles Philharmonic Orchestra at the age of seven and who now, at the age of eleven, has been awarded a Curtis Institute scholarship. His older brother, John, incidentally, is serving with the United States army.[345] Kay Sadanaga of the San Francisco Conservatory of Music has won several music competitions on the West Coast. General DeWitt decided that she could play there no more. But that did not prevent her from winning a piano scholarship at the Juilliard

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[341] *Ibid.*, Sept. 3, 1942; Feb. 19, 1944.

[342] *Ibid.*, November 5, 1942.

[343] *Ibid.*, April 1, 1944.

[344] *Ibid.*, November 27, 1943.

School of Music in New York City.[346] Teruko Akagi has received a scholarship to attend the Oberlin Conservatory of Music, and Mari Taniguchi, nisei soprano, was recently granted the artist's diploma, highest award of the Eastman School of Music.[347]

Even the dance and ballet have their nisei representatives. Yuriko Amemiya, who has appeared with the Martha Graham dance company, received a scholarship to attend the dance school at Bennington College in Vermont.[348] Sono Osato, who is part Japanese and would therefore have been evacuated by General DeWitt, has taken the country by storm.[349] Dorothy Maruki, whose study of the ballet in San Francisco and Sacramento was interrupted by General DeWitt's blanket orders, has lately been awarded a ballet dancing scholarship from the Metropolitan Opera Company of New York.[350]

Athletics is an important aspect of American life and we find that Americans of Japanese ancestry have made a place for themselves in this field, too. We have only to mention the names of Chet Maeda,[351] Colorado State football player who was mentioned for all-American honors; Peter Mitsuo Ida,[352] the former Stanford track star; Kenneth Furuya who ranks high among the nation's golf players;[353] Kiyoshi Nakama, captain of the Ohio

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[346] *Pacific Citizen*, October 9, 1943.

[347] *Ibid.*, Nov. 13, 1943; June 10, 1944.

[348] *Ibid.*, April 8, 1944.

[349] *Look Magazine*, Aug. 8, 1944; *P.M.*, Dec. 5, 1943.

[350] *Pacific Citizen*, May 27, 1944.

[351] *Ibid.*, April 8, 1943.

[352] *Ibid.*, May 27, 1944.

[353] *Ibid.*, July 30, 1942.

State University swimming team who broke the world's record for the one-mile swim in August, 1942, and was named on the 1942 all-American swimming team;[354-355] Joseph Nagata, Salt Lake University football star who is credited with leading his team to victory over Fordham;[356] Harry Osaki who was co-captain of Washington State's intercollegiate championship archery team, badminton champion of the college and ranking tennis and golf player when he was evacuated, and who followed his brother into the United States army as soon as he was permitted to volunteer (his two sisters volunteered for the WACs);[357] William Kajikawa who was a star athlete and later a coach at State Teachers College, Tempe, Arizona, and who is now in the army;[358] Watson Misaka who starred on the University of Utah basketball team which this year won the National Collegiate Athletic Association basketball championship;[359] Jack Yoshihara, University of Utah halfback;[360] Jim Yagi, who plays in the backfield of the same eleven,[361] and Jim Nagata who calls the signals for the Louisiana State football team.[362]

Boxing, too, has its nisei performers. Richard Miyagawa, who was forced to leave San Jose State College by evacuation, was unanimously chosen captain of the 1944

[354-355] *Ibid.*, Aug 13, Dec. 17, 1942.

[356] *Ibid.*, November 19, 1942.

[357] *Ibid.*, March 25, 1943.

[358] *Ibid.*, July 31, 1943.

[359] *Ibid.*, April 1, April 8, 1944.

[360] *Ibid.*, October 16, 1943.

[361] *Idem.*

[362] *Idem.*

University of Wisconsin boxing team by his teammates.[363] Two nisei, one a soldier in training at Fort Sheridan, Illinois, were finalists for the 118 pound championship in the Chicago Golden Glove tournament last February.[364] The best-known nisei boxer, a man who turned professional and lost a close decision to the world's featherweight champion, is probably dead. He was Henry Nakamura, who volunteered for the army in 1941 and now has been reported missing in action.[365]

Americans of Japanese ancestry have scored brilliantly in the field of science, too. Dr. Eben T. Takamine, the son of the scientist who discovered adrenalin, is working on a new process for the production of penicillin.[366] His work is considered by authorities to be particularly vital to the war effort. Another nisei, Dr. Henry Tsuchiya, is credited with a part in the discovery of a new bacteria-killer, a substance allied to penicillin.[367] With other scientists he ran hundreds of experiments in the laboratories of the University of Minnesota to make this significant advance. Then there is Dr. William N. Takahashi who had to relinquish a teaching position at the University of California to accommodate General DeWitt's racial phobia. He has been awarded a Guggenheim Fellowship for the study of virus reproduction and is now carrying on his important studies at Cornell University. It is no wonder that Joseph C. Grew has called Americans of Japanese ancestry, "an invaluable element in our popula-

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[363] *Pacific Citizen*, April 8, 1944.

[364] *Ibid.*, Feb. 26, April 1, 1944.

[365] *Ibid.*, April 1, 1944.

[366] *Ibid.*, October 2, 1943.

[367] *Ibid.*, May 27, 1944.

tion" and praised "the contributions of loyal Americans of Japanese ancestry."[368]

To detail the evidences of loyalty and patriotism of Americans of Japanese ancestry before and after Pearl Harbor would be an almost endless task. Before Pearl Harbor persons of Japanese ancestry pledged their help in any crisis, increased their food production if they were farmers, bought defense bonds, cheerfully answered each selective service call, and supported to the fullest extent the Red Cross, the U. S. O. and all other drives and measures related to national defense.[369] After Pearl Harbor they condemned Japan's action in the most scathing terms and matched their words by volunteering for the army, and by gathering funds to buy bombers, anti-aircraft guns and Red Cross ambulances for the United States forces.[370] They acted as blood donors and increased their contributions to all wartime appeals.[371] They pledged themselves to prevent and to report any subversive activity within the Japanese community.[372] The women busied themselves with knitting and with other services for the Red Cross, and the children salvaged scrap iron and old paper.[373] Anti-fascist forces among the nisei,

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[368]*Ibid.*, April 29, 1943; April 15, 1944; *Christian Century*, Letter to the Editor from J. W. Buckham of Berkeley, California, May 3, 1944, p. 505.

[369]*Congressional Record*, Appendix, Nov. 28, 1941; *Los Angeles Times*, Nov. 20, 1942; *Japanese American Review*, Sept. 21, Oct. 19, Nov. 16, 1940; March 8, April 19, May 3, May 17, June 28, July 26, Sept. 6, Oct. 4, Oct. 18, Nov. 29, 1941.

[370]*New York Times*, Dec. 9, Dec. 13, Dec. 15, 1941, Jan. 10, 1942; *Pacific Citizen*, Jan. 1942, March 1942.

[371]*California Daily News*, Jan. 28, Jan. 30, Jan. 31, Feb. 7, 1942; *Pacific Citizen*, Jan. 1942, Feb. 1942, June 4, June 18, 1942.

[372]*California Daily News*, Jan. 30, 1942; *Tolan Committee Report* of May, 1942, pp. 152-54.

[373]*California Daily News*, February 10, 1942; *Pacific Citizen*, March 1 1942.

such as the Nisei Democratic Club of Oakland, California which had supported an embargo on war materials to Japan and an embargo on oil shipments to Japan long before Pearl Harbor, redoubled their efforts on behalf of the cause of the democracies.[374] Even after evacuation, when a war poster contest was announced, nisei confined at Santa Anita sent in a number of entries.[375] And from behind barbed wire, too, they called for a second front in Europe, an opportunity to aid in the war effort, and they continued to contribute money and blood.[376] American Legion Posts formed anew within the Assembly and Relocation Centers and nisei at Manzanar and Poston manufactured camouflage nets for the army.[377] Men and women, some of whom had never done agricultural work before, went out in unrestricted regions to pick and save vital crops.[378] Those who had been living in the east and who had never been evacuated gave ample evidence of their patriotism, too. On the 12th anniversary of the start of the Japanese drive on Manchuria, twenty-five persons of Japanese ancestry, members of the Japanese American Committee for Democracy, appeared in New York at the Chinese Blood Bank, and donated blood for the soldiers of Free China.[379] When the Bataan atrocities were announced, the reply of the American Japanese was

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[374] *Hearings before the Select Committee Investigating National Defense Migration* (Tolan Committee), pp. 11221, 11222.

[375] *Los Angeles Times*, July 16, 1942.

[376] *Los Angeles Daily News*, Aug. 15, 1942; *Pacific Citizen*, July 2, July 30, Aug. 20, 1942, Mar. 11, 1943.

[377] *Pacific Citizen*, Oct. 15, Oct. 29, Nov. 5, 1942; Feb. 25, 1943.

[378] *Ibid.*, February 25, 1943.

[379] *The New Republic*, item in the "Mail Bag," October 4, 1943; *Pacific Citizen*, September 5, 1943.

the most eloquent of all. They came in numbers to the Red Cross Banks to offer their blood in protest.[380]

The greatest and sometimes the final proof of loyalty to a country during a time of war is cheerful and heroic military service. At the time of Pearl Harbor there were over 3,000 young Americans of Japanese ancestry in the armed services.[381] The officer who commanded and trained many of them has testified to their excellent conduct and ability.[382] Today there are over 10,000 Americans of Japanese ancestry in service.[383] Their exploits and brave victories have since shamed and softened the most hardened critics of the group. Recently William P. Haughton, Commander of the California Department of the American Legion, said:

> "Numerous persons of Japanese ancestry are now serving with the armed forces of our country on the battlefronts, and according to all reports, are serving valiantly and well.
>
> "We salute all men and women who love this country enough to fight, and, if need be, die for it. Every person good enough to fight for us is entitled to our respect and equal protection under our constitution."[384]

It is not unusual for parents and sisters who are detained behind barbed wire in Relocation Centers to have

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[380] *San Francisco Chronicle*, Feb. 1, 1944; *Pacific Citizen*, Feb. 5, 1944, Feb. 12, 1944; *Los Angeles Times*, Jan. 29, 1944.

[381] *Hearings before the Select Committee Investigating National Defense Migration* (Tolan Committee), p. 11151.

[382] *Pacific Citizen*, February 18, 1943.

[383] *Ibid.*, Mar. 11, 1943.

[384] *Ibid.*, May 18, 1944.

3, 4, 5 and even 6 sons and brothers in the United States Army.[385] When, in February, 1943, the call came for volunteers for a United States Army combat unit, 1,300 young men volunteered for service from the Centers despite all that had happened to them and to their families.[386] The Nisei 100th and 442nd Infantry Battalions are best known for their gallant and important battles in Italy and for the citations and awards these have brought,[387] but it is now recognized that Japanese-Americans have fought for the United States on every battlefield of the war, and in the Pacific as well as in Europe. Americans of Japanese ancestry were at Pearl Harbor on December 7, 1941, where Private Tadao Migita died while defending Wheeler Field from enemy attack,[388] and where a Nisei National Guardsman, as Colonel E. W. Wilson has revealed, captured the first enemy soldier who fell into American hands in this war.[389] Sergeant Arthur Komori participated in the defense of the Philippines and was evacuated from Bataan at the last moment, escaping to Australia with some of General MacArthur's forces.[390] Sergeant Frank Fujita Jr. fought the Japanese in Java, and his mother has been notified that he is a prisoner of the Japanese.[391] Sergeant Fred Nishitsuji, formerly of

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[385] *Ibid.*, Oct. 23, Aug. 14, Mar. 25, 1943; July 22, Aug. 19, 1944.

[386] *Ibid.*, Mar. 11, 1943.

[387] *News Week*, Nov. 8, 1943; *Honolulu Star Bulletin*, Aug. 28, 1944; *St. Louis Post Dispatch*, July 29, 1944; *San Francisco Chronicle*, July 28, 1944; *Milwaukee Journal*, April 5, 1944.

[388] *Pacific Citizen*, September 10, 1942.

[389] *Ibid.*, March 18, 1943.

[390] *Ibid.*, August 20, 1942.

Los Angeles, is known to have participated in the bloody Buna campaign.[392] It is also known that Sergeant Ralph Kimoto has been on active duty in the jungles of New Guinea.[393] and the War Department announced on August 15, 1943, that Sergeant Kazuo Komoto had been wounded in action in the Southwest Pacific.[394] It is a commentary on the DeWitt method of determining loyalty that Sergeant Komoto's mother had to receive this news at the Gila Relocation Center to which she had been evacuated from California. Sergeant Ben Moriwaki and Sergeant Roy Ashizawa are nisei soldiers who landed at Attu looking for the Japanese enemy,[395] and Sergeant Kuni Nakao has been on duty in the Alaskan war theater.[396] On August 19, 1944, it was disclosed that American soldiers of Japanese ancestry had taken part in the capture of Saipan. Six of them, including a former resident of Marysville, California and another from Los Angeles, California, were cited and decorated for meritorious service in action there.[397] In a letter which has been made public, H. V. Kaltenborn, well-known radio commentator, has written:

"I have just returned from a comprehensive, although, brief tour of our Pacific fighting areas.

"On the basis of first-hand information I can tell you that American citizens of Japanese ancestry are

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[392] *Ibid.*, Dec. 3, Dec. 24, 1942.

[393] *Ibid.*, August 21, 1943.

[394] *Ibid.*, August 21, 1943.

[395] *Ibid.*, July 10, 1943.

[396] *Ibid.*, Oct. 2, 1943.

[397] *Los Angeles Times*, Aug. 20, 1944; *San Francisco Chronicle*, Aug. 21, 1944; *Los Angeles Daily News*, Aug. 19, 1944.

performing some of the most valuable work that is being done by our Armed Forces in the Pacific. These American citizens of Japanese ancestry have not only proved their loyalty, but in many cases they have voluntarily risked their lives in order to perform important front-line services."[398]

It has been necessary to present the evidence concerning the assimilation, loyalty and contributions of Americans of Japanese ancestry because, under the stress of war, a tendency has set in to accept uncritically anything derogatory that is said about a group which can be somehow associated, if only by means of a name or label, with the enemy Japanese. Actually the subject of the assimilation and Americanism of the citizens of Japanese ancestry has been intensively studied a number of times by impartial and able investigators, and there is little excuse for the gullibility and misinformation that surrounds the topic today.

As long ago as 1928, Dr. Robert E. Park, chairman of the Department of Sociology of the University of Chicago, directed a large-scale study of resident Orientals which was called "Survey of Race Relations of the Pacific Coast." A number of publications resulted, and the large body of materials which were gathered were placed in a depository of the Survey at Stanford University. The undertaking was ambitious and extensive, being supported by a $55,000 budget. Scholars and leading citizens of the West Coast as well as from other parts of

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[398]Letter of H. V. Kaltenborn to Adalia Fisher of the Committee for work with Japanese, St. Louis, Missouri, dated Dec. 20, 1943.

the country participated in the research.[399] Dr. Park and his associates, to sum up their findings as far as assimilation is concerned, determined that the American of Japanese ancestry "born in America and educated in our western schools is culturally an Occidental, even though he be racially an Oriental, and this is true to an extent that no one who has investigated the matter disinterestedly and at first hand is ever likely to imagine."[400]

In 1929 a substantial grant was made to Stanford University by the Carnegie Corporation, for a study of Americans of Japanese ancestry on the West Coast. The work was carried out under the direction of Professor E. K. Strong and resulted in the appearance of four volumes, the first published in 1933.[401] A large staff of trained workers co-operated to gather and analyze the materials. Every device known to social science was employed. The general conclusion, to use Professor Strong's own words, was that:

> "The word 'assimiliation' has two meanings—interbreeding and comprehension of political and social conditions. In the latter sense, the young Japanese are more readily assimilated than people of several European races. . . ."[402]

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[399]Robert E. Park, "A Race Relations Survey," *Journal of Applied Sociology*, Vol. VIII, No. 4, 1924, pp. 195-205; see also *Survey of Race Relations, A Study of the Orientals on the Pacific Coast*, Southern California Regional Committee, 731 South Hope Street, Los Angeles, 1926.

[400]Robert E. Park, "Behind Our Masks," *Survey*, May 1, 1926, p. 139.

[401]E. K. Strong, *Japanese in California*, Stanford University Press, 1933; E. K. Strong, *The Second-Generation Japanese Problem*, Stanford University Press, 1934; E. K. Strong and others, *Vocational Aptitudes of Second-Generation Japanese in the United States*, Stanford University Press, 1933; Reginald Bell, *Public School Education of Second-Generation Japanese*, Stanford University Press, 1935.

[402]E. K. Strong, *The Second-Generation Japanese Problem*, p. 26.

Through the years there have been a number of other studies and investigations by impartial and competent students and they all support the findings of Strong and Park.[403]

In all the loose talk about "lack of assimilation" and "close-knit racial groups" there is no hint that the trained investigators who have pursued the subject for years were even consulted. The Tolan Committee called politicians and sheriffs before it to testify concerning questions of assimilation and acculturation. The men who had made a life study of these questions, Professors Strong, Bell and Farnsworth of Stanford and Professor Bogardus of the University of Southern California, among others, were never consulted or approached. We talk a great deal about the irrationality and anti-intellectualism of the Nazis and Fascists, of their appeal to violent prejudice and emotion instead of to knowledge. The Nazi pattern was never better exemplified than in this particular crisis. With good reason has Professor Freeman written:

> "When the final history of the Japanese evacuation is written, it will almost certainly appear that decisions were made on misinformation, assumptions, prejudices, half-truths, when excellent, scientifically accurate material was available."[404]

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[403]Darsie, Marvin L., "The Mental Capacity of American-born Japanese Children," *Comparative Psychology Monograph*, Vol. III, Baltimore, Williams & Wilkins Co., 1926; R. D. McKenzie, *Oriental Exclusion*, Chicago University of Chicago Press, 1928; E. C. Mears, *Resident Orientals on the American Pacific Coast*, 1928; Harry A. Millis, *The Japanese Problem in the United States*, New York, Vanguard Press, 1942; William C. Smith, *Americans in the Making: The Natural History of the Assimilation of Immigrants*, Appleton-Century, 1939; Marjorie R. Stearns, *History of the Japanese People in Oregon*, Thesis Series, No. 4; University of Oregon, Eugene, Oregon, 1937.

[404]Harrop A. Freeman, *Op. cit.*, p. 449.

There is little need to deal at length with the argument that Americans of Japanese ancestry would have turned upon the country of their birth because of past discrimination and mistreatment. The argument itself is a twisted and peculiar one, implying that the cure for injustice is more injustice. It gives to racists a powerful weapon to use at some future time against any minority which has experienced local prejudice—against Negroes, Jews, Catholics, Mexicans and Orientals other than Japanese. If this conception is accepted by the Courts, no minority group can ever "be above suspicion." The facts we have reviewed dispose of this argument as far as Americans of Japanese ancestry are concerned. As we have shown, these citizens were making rapid and remarkable progress in educational, artistic, scientific and economic endeavors. They had reason to be proud of their achievements and they were proud of their achievements. If they had their enemies among Caucasions they also had many kind and powerful friends. To the question of whether they would aid an enemy for *any* reason, history has given an unequivocal answer. The reaction of those of Japanese ancestry in Hawaii when the attack came and the services which have since been rendered to the country's cause in all theaters of war by Americans of Japanese ancestry is the complete rejoinder to this unworthy rationalization.

We ask this Court to review the evidence we have submitted with particular care, because in the *Hirabaya-*

shi case it accepted much too easily the assumptions and broad charges that we have gone to some trouble to answer here. The Opinion of the Court in the *Hirabayashi* decision refers to conditions which "have in a large measure prevented their assimilation as an integral part of the white population."[405] It accepts without question the assertion that "there has been relatively little social intercourse between them and the white population."[406] It speaks of their "isolation"[407] and, most disturbing of all, it justifies the imposition of a curfew by reference to "ethnic affiliations with an invading enemy."[408] We contend that whatever affiliation citizens of Japanese ancestry may have with the Pacific enemy is of a general biological nature. We contend that the ethnic affiliations of these people are solidly with America. To assert otherwise is to ignore the rich store of evidence that scholarship and history have heaped high for us, and is to imply the Nazi doctrine that race and physical type determine loyalty and "ethnic affiliations."

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[405] *Hirabayashi v. United States*, Opinion of the Court, p. 96.

[406] *Ibid*, p. 98.

[407] *Idem*.

[408] *Hirabayashi v. United States*, Opinion of the Court, p. 101.

12. Evacuation Was Not a Military Necessity But Was Due to False Reports of Sabotage in Hawaii, to the Activites of Anti-Oriental Pressure Groups and Unscrupulous Competitors, and Most Important of All, to the Admitted Race Prejudice of the Commanding General Who Issued the Evacuation Orders.

We have spoken of the intial tendency of the people of the West Coast to be calm and reasonable, and to distinguish between the Japanese enemy and our residents and citizens of Japanese ancestry. What then, induced so many of them who felt that what was happening was basically wrong and unconstitutional, to permit evacuation to take place? On February 13, 1942 the *Argonaut*, which had pleaded for tolerance but a few weeks before, published an editorial which is titled, "Intern all Japanese." In the editorial we find these amazing sentences:

> "In making such a recommendation the *Argonaut* is duly conscious of the legal problems involved. It recognizes that in advocating such an action it is urging that the Constitution of the United States be violated. It fully realizes the gravity of such a move."[409]

Only panic would drive responsible men to advocate doing something that at the same time they admit is illegal and wrong. What was the nature of this paralyzing fear?

Between December 7 and the time when the evacuation policy was determined, it became the belief of the great majority of our citizens that the Pearl Harbor attack

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[409] "Intern All Japanese" (editorial), *The Argonaut*, Vol. CXXI, No. 3353, February 13, 1942, p. 3.

was effectively aided by betrayal from within on the part of persons of Japanese ancestry in Hawaii. Largely because of that belief, high officials sanctioned the evacuation of Americans of Japanese ancestry from the west coast of the United States. Because of that belief, millions of fellow citizens stood by and permitted something to happen that was repugnant in principle to them. Because they did not *at the time* have the relevant facts to refute this belief, others who doubted the necessity and wisdom of the move remained silent or were silenced.

The thoroughly discredited Pearl Harbor rumors have become a source of embarrassment to the proponents of evacuation. They now like to omit any reference to this unsavory episode. Yet, it is an indisputable fact that the myth of sabotage in Hawaii was the screen behind which racists could patriotically mask their ugly and longstanding intentions. It was the disguise in which the unscrupulous marched to acquire the fruits of envy and avarice. It was the weapon with which those who would normally have stood firm for justice and democratic action were cowed. During the crucial period it was the tool everywhere of unreason, panic, malice, and reaction.

Every person who was active in the formulation of the evacuation policy was greatly influenced by the Pearl Harbor sabotage and fifth column activity reports. The great majority of the pro-evacuation individuals and groups have admitted that these reports were an important factor in their decision and their stand. Almost without exception, they went on record as demanding the removal of persons of Japanese ancestry from the west coast so that the internal betrayal which they insisted ac-

counted for Pearl Harbor would not be duplicated on the west coast.

It has since been proved, by official documents and statements from the highest and most responsible army, navy, intelligence and civil officials in Hawaii that there was no sabotage or evidence of disloyalty on the part of those of Japanese ancestry in the Territory of Hawaii before, during, or after the attack on Pearl Harbor. Evacuation, then, was urged to prevent a "repetition" on the mainland of the United States of something which never occurred in Hawaii.

One of the most important figues in the movement for total evacuation was Mayor Fletcher Bowron of Los Angeles. On February 5, he delivered a radio address which opened the campaign for removal in Southern California. The degree to which this city official's thinking was dominated by Pearl Harbor rumors and alarms can best be judged by this excerpt from his speech:

> ". . . The most natural thing would be for the most dangerous of them to condemn the Japanese war clique, the Axis powers, to loudly declare a prejudice against Japan and proclaim a belief in American democracy with an emotional pledge of allegiance to the Stars and Stripes. Of course, they would try to fool us. They did in Honolulu and in Manila, and we may expect it in California. . . ."[410]

The apprehension and misconceptions of Mr. Bowron were shared, almost without exception, by members of Congress, particularly by Congressmen from the west and

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[410] *Congressional Record*, February 9, 1942, pp. A504-05.

south. On February 18, Representative Costello of California replied from the floor of the House to the suggestion that the Department of Justice was performing its duty efficiently and that harsh measures were not necessary. On the basis of the Pearl Harbor rumors, which he accepted without question or examination, he enunciated the pernicious doctrine of preventive arrest:

> "I may state to the gentleman that he, likewise, fails to understand the problem. You cannot wait until a crime is committed and then go to a grand jury and demand that the certain person who committed the crime be put in prison. What we have to do is anticipate the commission of a crime. We have to move before any sabotage takes place, and, if you do not move in advance of that sabotage, Pearl Harbor will be insignificant compared with what could happen on the Pacific Coast. . . ."[411]

Mr. Costello was followed by Representative Angell, who had been apparently no more critical of the Pearl Harbor reports than his colleagues. Said this western Congressman:

> "We must not wait, as we did at Pearl Harbor, until it is too late. Is it reasonable to assume that in the case of Pearl Harbor we were powerless to do anything to protect ourselves when those Japanese were located all around that strategic area ready and poised to bomb into eternity our peaceful citizens and blow up our defenses? . . . I urge that all Japanese be evacuated forthwith from these areas and be held in protective custody."[412]

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[411] *Ibid.*—House, February 18, 1942, p. 1456.

[412] *Ibid.*—House, February 18, 1942, p. 1457.

On February 18, Representative Rankin of Mississippi revealed his complete acceptance of the sabotage reports:

> ". . . These Japs who had been there for generations were making signs, if you please, guiding the Japanese planes to the objects of their iniquity in order that they might destroy our naval vessels, murder our soldiers and sailors, and blow to pieces the helpless women and children of Hawaii."[413]

On February 23, 1942, Mr. Rankin spoke on the same subject again. He began by saying: "Mr. Speaker, I want to renew my insistence that the Japanese in this country, in Alaska, and in Hawaii be placed in concentration camps at once." He had not proceeded long before he revealed his basic reason for this unprecedented request:

> "It is well known that Hawaiian-born Japanese, who claim the protection of the American flag, were giving information to Japan by radio, telephone, flashlight, and other signals prior to and during the Pearl Harbor attack and have been doing so since—just as these American-born Japs are now doing along the Pacific Coast. . . ."[414]

The Pearl Harbor fifth column and sabotage rumors, not only were the principal motive and excuse advanced by congressmen for evacuation, but were also the principal argument urged for the passage of Public Law 503, 77th Cong., 2d sess., ch. 191, which provides penalties for the violation of restrictions or orders pertaining to evacuation. This bill was introduced on March 19, 1942

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[413] *Ibid.*, February 19, 1942, p. A692.

[414] *Ibid.*, February 28, 1942, p. A839.

by Senator Reynolds of North Carolina and he managed to pack some of the most fantastic and childish of the tattle into his address:

> "We will remember Pearl Harbor. We recall that the invading forces certainly were provided aid from Japanese on land on the island of Oahu, which, I understand, is the only island of the Hawaiian group that is anywhere near properly fortified at the present hour. The report reaches us that canefields were cut in the form of arrows pointing to military objectives; that vegetable dealers and merchants kept detailed records of purchased naval supplies in order to gage fleet movements; and that fishing sampans are believed to have been in touch with ships of the Japanese fleet, or certainly with agents of the Japanese military intelligence division. . . .
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> "When the vicious attack of December 7 came, Japanese are reported to have wrecked cars and otherwise obstructed traffic. It is revealed that Japanese pilots shot down above Pearl Harbor were found to be wearing Honolulu high-school insignia and United States college rings, and one person, later arrested as a spy, had been a highly regarded Honolulu citizen for 20 years."[415]

In February and early March, the Select Committee Investigating National Defense Migration of the House of Representatives (Tolan Committee) went to the west coast and held hearings on the "Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones." It is important to examine the published records of the hearings, for these meetings brought together many

[415] *Ibid.*—Senate, February 19, 1942, pp. 2814-2815.

of the persons and all the arguments which were responsible for evacuation.

The Hearings began in San Francisco and the first witness who testified on the morning of February 21 was Mayor Angelo J. Rossi. He was alarmed at what the "fifth columnists" had done at Pearl Harbor and was most suspicious of American citizens of Japanese ancestry:

> "The Japanese situation should be given immediate attention. It admits of no delay. The activities of the Japanese saboteurs and fifth columnists in Honolulu and on the battle fronts in the Pacific have forced me to the conclusion that every Japanese alien should be removed from this community. I am also strongly of the conviction that Japanese who are American citizens should be subjected to a more detailed and all-encompassing investigation. After investigation, if it is found that these citizens are not loyal to this country they too, should be removed from the community."[416]

Into the testimony of this first day, too, was introduced a letter from Matthew Brady, District Attorney of the City and County of San Francisco, to Earl Warren, then Attorney-General of the State of California. Mr. Warren had asked whether there was any danger of sabotage and fifth column activity and whether there should be differential treatment of aliens according to nationality. Since Mr. Warren, now Governor of California, is known to be a prominent member of the most bitterly anti-Oriental organization in existence, The Native Sons of

[416] *Hearings Before the Select Committee Investigating National Defense Migration* (Tolan Committee), p. 10965.

the Golden West, Mr. Brady may have felt under some pressure in returning his answer. At any rate Mr. Brady replied:

> "Before answering the questions specifically, it occurs to me that I should state some general views I have, that to a great extent control my answers. I believe that if the Japanese should invade California, by airplane, submarine, or in any other way, they will have arranged to have in advance the assistance of various aides in our State. I can see no reason to anticipate that they will omit the precautions they took at Pearl Harbor."[417]

The star witness of the morning, however, was California's Attorney General Earl Warren himself. His entire argument for wholesale evacuation was based on analogies from assumed Hawaiian sabotage and fifth column activity, as the following excerpt from his testimony shows:

> "We believe that any delay in the adoption of the necessary protective measures is to invite disaster. It means that we, too, will have in California a Pearl Harbor incident. I believe that up to the present and perhaps for a long time to come the greatest danger to continental United States is that from well organized sabotage and fifth-column activity."[418]

The Hearings of February 23 saw a meeting of minds on the same topic between the chairman, Congressman

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[417] *Ibid.*, p. 10991.

[418] *Ibid.*, p. 11010.

Tolan, and W. J. Johnson, Captain of Police, Berkeley, California:

"The Chairman. . . . Sabotage will come when the attack comes. Do you agree with us on that?

"Mr. Johnson. Emphatically so. There is no question in my mind about that, Mr. Chairman. None of us knows what is going to happen here, but there is one thing of which we are dead certain. That is what has already happened at Pearl Harbor and we all know how it was brought about there. There is no question about that. That is factual, that is history. We know what happened there, but we don't know what might happen here in the future. However, it seems to me that it is fairly good thinking to believe that what happened there might well also happen here.

"The Chairman: In other words, at Pearl Harbor, Honolulu, there wasn't a single indication of sabotage until the attack happened?

"Mr. Johnson. Not until the correct time, the proper time.

"The Chairman. It was timed very well.

"Mr. Johnson. Surely."[419]

The absolute confidence of the committee members in their advance verdict of sabotage, and the naive supposition of witnesses that these Congressmen must have fresher, fuller, and more authentic information than the ordinary person, made extremely difficult and embarrassing testimony by citizens of Japanese descent, or by others speaking in their behalf. When the secretary of

[419] *Ibid.*, p. 11109.

the Japanese American Citizens League, Mr. Mike Masaoka, tried to plead for his group, he was immediately and unfairly put on the defensive by Mr. Tolan's simulated knowledge about Pearl Harbor:

> "The Chairman. What about your people at Pearl Harbor? Did they remain loyal Americans? . . . There are authentic pictures during the attack showing hundreds of Japanese old automobiles cluttered on the one street of Honolulu so the Army could not get to the ships. Are you conversant with those things?"[420]

Thus far, it might be mentioned, Mr. Tolan has not produced these "authentic pictures."

A little later another witness, a person of Japanese ancestry, tried to persuade the committee that the citizens had loyally cooperated with the authorities. The chairman, Mr. Tolan, promptly discomforted him by retorting:

> "Let me ask you this: the sabotage at the time of the attack of Pearl Harbor and the disloyalty of the Japanese there was so widespread that the details have never as yet been given to the public. Now what I would like to get from you is this: Do you think the Japanese of Hawaii stand on a different basis than the Japanese in California."[421]

By the time an "obstinate" witness, a representative of the C.I.O. appeared, Mr. Tolan was warmed to his subject. In answer to the witness' opinion that the regular

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[420] *Ibid.*, p. 11141.

[421] *Ibid.*, p. 11153.

agencies could control the situation without evacuation, the Chairman argued:

> "We had our F.B.I. in Honolulu, yet they had probably the greatest, the most perfect system of espionage and sabotage ever in the history of war, native-born Japanese. On the only roadway to the shipping harbor there were hundreds and hundreds of automobiles clogging the street, don't you see? There they sought to distinguish the Japanese in Pearl Harbor from our American Japanese. Do you think there is a distinction yourself? Do you think we can trust them?"[422]

After a further exchange between the chairman and the witness, Congressman Sparkman of Alabama intruded with a statement which effectively disposes of any argument that evacuation was a military necessity or a military decision:

> "Mr. Sparkman. It seems to me you completely disregard the fact that it was the action of the Japanese, both native-born and second-generation Japanese, in Hawaii that very largely caused this present situation."[423]

A moment later, when the witness asked Mr. Sparkman whether he thought that there was a higher percentage "of spies or saboteurs among the second-generation of Japanese" than "among the second-generation Germans in Yorkville, N. Y.," the Congressman replied:

> "Well, the only thing I can go by is what seems to be the case thus far—we know that we have lost ground so far because of the espionage, the sabotage

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[422] *Ibid.*, p. 1181.

[423] *Ibid.*, p. 11184.

conducted by the Japanese whom we trusted to a certain extent in Hawaii."[424]

The hearings held in Portland, Oregon, on February 26 revealed the same looseness of knowledge and speech on the part of the Committee and their evacuation minded friends. Whenever a witness opposed evacuation he was challenged and disconcerted by Pearl Harbor rumors paraded as a substantiated but not "released to the public" fact. When a Methodist Missionary who had had long years of contact and experience with people of Japanese ancestry, sought to defend their loyalty and their behavior, Chairman Tolan was ready with his stock reply:

> "Of course, you make a point there that we have heard several times in Washington; that there is no evidence so far as sabotage on the west coast. So far, there are no cases of sabotage; that is, generally speaking. Well, there weren't any in Pearl Harbor, either, were there, until the attack came? There wasn't any sabotage; it all happened at once."[425]

That evacuation of west coast persons of Japanese ancestry was being advocated on the basis, not of their own behavior, but on the basis of hypothetical misbehavior attributed to a group hundreds of miles away, emerged a number of times in the testimony:

> "Mr. Millikin. I feel that, due to the events of Pearl Harbor and events since that time, the sentiment of the people of Seattle is overwhelmingly in favor of evacuation. . . . That is my idea—and I am pretty sure it is the correct one—of the atti-

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424 *Ibid.*, p. 11184.

425 *Ibid.*, p. 11387.

tude of the city of Seattle. They think that it is a danger. They regret the train of circumstances that lead up to this decision today; but they know that we can't take the chance of leaving them here and having another Pearl Harbor or something worse right here in Seattle or in the Pacific Northwest."[426]

When James Y. Sakamoto, a past national president of the Japanese American Citizens League and editor of the *Japanese American Courier*, took the stand, Representative Arnold of Illinois made what was perhaps the most important revelation of the entire hearing:

"Mr. Arnold. *Of course, you probably recognize that if the Japanese in Honolulu and Hawaii had not conducted themselves as they did on December 7, that perhaps such drastic action would not be thought of in this area of the United States at this time.* (Emphasis supplied.)

"Mr. Sakamoto. Do I understand from that, that the Americans of Japanese ancestry in Hawaii did not contribute loyally toward the defense effort on that day, at the time of the attack?

"Mr. Arnold. Well, there is a good deal of evidence to that effect, yes.

"Mr. Sakamoto. Well, in that case, I am very sorry to hear about that, because here, if any such thing ever happened, you will find the Americans of Japanese ancestry. I am certain, 100 percent behind our defense efforts. We are willing to even sacrifice our lives."[427]

[426] *Ibid.*, p. 11404.

[427] *Ibid.*, p. 11477.

And while the Japanese and Japanese-Americans of the mainland were being pilloried and evacuated for the alleged misdeeds of the "Japanese" at Pearl Harbor, how were the people of Japanese ancestry in Hawaii faring? On February 5, in an interview in Honolulu, Dr. Romanzo Adams, author of *The People of Hawaii* and noted authority on Hawaiian racial and social problems, praised the military governor of Hawaii for "indicating his confidence in the people of Japanese extraction and giving them an opportunity to show their loyalty to the United States."[428] Dr. Adams particularly commended General Emmons because "he permitted many young Japanese-Americans to demonstrate their loyalty by acting as territorial guards . . . over public buildings, utilities, highways, and other vital points."[429]

In the spring of 1943 Colonel Kendall J. Fielder, chief of intelligence forces in Hawaii, summarized the policy that has been followed in Hawaii. He said:

> "I would like now to point proudly to another way in which our national administration and our government here—civil and military—have treated the race problem in Hawaii.
>
> "In brief we have removed and shall continue to remove—for the national and local security—that minority of aliens and citizens here who are considered dangerous or potentially dangerous in time of war. We did not impugn, because of race, the good name of the rest of them, alien or citizen.

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[428] Interview with Romanzo Adams in Honolulu, February 4, 1942. Account reprinted in *California Daily News*, February 5, 1942.

[429] *Idem.*

"How differently a Himmler or a Heinrich would have handled this delicate situation! Does anyone believe for a moment that any of the Axis crowd would give one of enemy race a fair chance to prove himself? Yet that's what was done in Hawaii—and so far it has proved militarily sound. . . . It would take much too long to tell you of the many concrete ways in which many of these people who were *on the spot* have proved their love for America and have helped solve an otherwise ticklish military problem here. For the information of all who might be misled, there is none among us who has been led into this policy out of mawkish sentimentality, of gullibility. . . . Her (Japan's) army and navy must definitely be crushed. The question of Americans of Japanese blood is far different. They are Americans—and until they prove (or show themselves dangerously capable of proving) traitorous, they should be treated as Americans.

"This must not be construed as sentimentality, or hands-off for business reasons or anything else of a negative nature, but rather as a sane, reasonable, democratic and SAFE judgment. It is simply felt that the Japanese element of the population, if accepted and united in purpose and action, is an asset to the community."[430]

For obvious reasons Colonel Fielder was forced to use Himmler and Heinrich as examples of men who would have used a different approach. Actually, however, he must have been thinking, "How differently a DeWitt *has* handled this delicate situation!"

[430]Kendall J. Fielder, "Democracy and Military Necessity in Hawaii," an address delivered at the University of Hawaii, Thursday, March 25, 1943. Printed in *Hawaii Educational Review*, April, 1943, pp. 242-43.

As far as the handling of this issue is concerned, mainland United States and Hawaii have acted as though they were two separate nations motivated by altogether different philosophies and needs. One would never guess that two regions were fighting the same war, responding to the same "military necessity" and were being defended by the same army and navy. It is to be hoped that the contrast does not continue into legal thought and important court decisions. In April, 1944, when martial law in Hawaii was being challenged in the Courts, the Government used the same arguments that are now being used to justify evacuation. The numbers of persons of Japanese ancestry, dual citizenship of Japanese-Americans, language schools, and alleged "relationship of part of the population to the enemy," etc., were submitted as reasons for the maintenance of martial law. The United States District Court also heard the evidence concerning the good behavior of the Japanese population during and since the Pearl Harbor attack and of its contributions to the war effort in all its phases.[431] The District Court then ruled that martial law was no longer necessary for Hawaii. The nation and the world will be eager to learn whether the methods of Himmler, Heinrich and DeWitt or those of Emmons and Fielder are to be approved.

The war, and the numbing effect on fair-minded people of Pearl Harbor sabotage rumors, gave traditional anti-Oriental pressure groups and envious competitors an opportunity to "get rid of the Japanese." In his articles, "Racism on the West Coast," Mr. McWilliams has traced

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[431] United Press Dispatch of April 10, 1944, from Honolulu; quoted from *Milwaukee Journal*, April 10, 1944; see also *Time Magazine*, Sept. 6, 1943, p. 21; *Newsweek*, Sept. 6, 1943.

the activities toward this end of such race-conscious pressure groups as the Sons and Daughters of the Golden West and the California Joint Committee on Immigration.[432] The insincerity of the claims of these forces that they were concerned about "military necessity" and the nation's safety can be gauged from the fact that the Joint Committee on Immigration, though it called for evacuation of mainland Japanese, was "unalterably opposed" to the removal of "Japanese" from threatened Hawaii.[433] The reason, of course, was that evacuation from Hawaii would have meant removal to the mainland, and the aim of the Joint Committee has always been to reduce and not to augment the numbers of those of Japanese ancestry on the mainland. So in spite of all vocalizations, its long-time racial policy came first with the Joint Committee and national safety was a secondary consideration.

The duplicity of many "interested groups" which demanded evacuation on grounds of military necessity is shown in another manner. No sooner was their wish gratified than they proposed a long list of discriminatory measures aimed at the unfortunate evacuees. Clarence Hall has summed up the point in these words:

> "Not satisfied with having evicted the Japanese Americans, these elements are now trying to lock the doors behind them. Since evacuation a whole flock of discriminatory measures have been proposed—among them being efforts to void their citizenship, seize their property, disfranchise Nisei,

[432] Carey McWilliams, "Racism on the West Coast," *The New Republic*, May 29, 1944, pp. 732-33; June 12, 1944, pp. 784-85.

[433] Carey McWilliams, "Racism on the West Coast," May 29, 1944, p. 32.

> voters, and deport them to Japan after the war. Such post-evacuation efforts, carried on by the very same persons and groups whose word had the most weight in bringing on evacuation, are the strongest indication that military necessity had less to do with their motives than racial prejudice."[434]

A number of economic groups and their spokesmen, too, have found it most profitable to combine patriotism and business and to see "military necessity" and "national safety" in measures that eliminate their competitors. Some of them are amazingly frank about the material roots of their agitation.[435] We ask this Court to take judicial notice of the character of the groups which urged evacuation and of their obvious motivations. If pressure groups of this kind have found a formula acceptable to the courts for displacing those whom they dislike and for eliminating economic competitors, this nation will face a period of persecution and division that its free institutions may not be able to survive.

The civilians who, because they were influenced by Pearl Harbor sabotage rumors, became panic-stricken and requested evacuation or permitted it to occur without strong protest, did not know the facts. Perhaps the politicians and local authorities whom we have quoted, too,

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[434] Clarence Hall, "Inside Nisei America," *The Christian Advocate*, Oct. 29, 1942, p. 14.

[435] For evidences of economic motivation in evacuation and its aftermath see *Tolan Committee Report* of May, 1942, pp. 154-56; *American Nurseryman*, Oct. 1, 1942; *New York Times*, Feb. 22, 1942; (Special dispatch of Lawrence Davies of Feb. 21, from Salinas, California); *The Open Forum*, Aug. 5, 1944, p. 1; *Pacific Citizen*, Oct. 1, 1942; May 20, Oct. 16, 1943, July 22, 1944; Frank J. Taylor, "The People Nobody Wants," *Saturday Evening Post*, May 9, 1943, p. 24; *Hearings before the Select Committee Investigating National Defense Migration* (Tolan Committee), pp. 11432, 11584-11585, 11610-11611, 11254, 11242, 11243.

were ignorant. But General DeWitt, who ordered the evacuation, certainly must have been aware of the truth and must have been cognizant of the grounds on which his fellow officer, General Delos C. Emmons, refused to order mass internment or evacuation of the persons of Japanese ancestry in Hawaii.

Why then did General DeWitt, in spite of what he knew or could easily have learned, act upon the advice of racists and mean-spirited economic rivals? Why did he not allay hysteria by informing the public concerning the facts in Hawaii? No mainland officer spoke to the people of the West Coast as did General Emmons and Colonel Fielder to the people in Hawaii in order to halt rumor and fear.

We contend that General DeWitt accepted the views of racists instead of the principles of democracy because he is himself a confessed racist. This is no discovery of ours and it requires no extended argument on our part to prove this. General DeWitt has gone to unusual lengths to make perfectly clear his unalterable hostility, *on racial grounds*, to all persons of Japanese ancestry, regardless of citizenship and regardless of evidences of loyalty.[436]

In dealing with persons to be evacuated from the West Coast defense zone, General DeWitt has paid remarkably little attention to the military situation. We have already pointed out how his evacuation orders continued to be issued after the military situation was materially altered for the better. The day he permitted several thousand German and Italian aliens who had been ordered out of vital defense areas, to return to their former addresses,

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[436] For comments on General DeWitt's revelation of his prejudice see *Christian Century* (editorial), May 5, 1943, p. 532; Harrop A. Freeman, *Op. cit.*, p. 426.

was June 28, 1942.[437] This was the *day after* the announcement of the capture of the German saboteurs who had landed on our shores.

It was a different voice from that of the military realities to which General DeWitt harkened. His impetus to action is found in his statement:

> ". . . In the war in which we are now engaged racial affinities are not severed by migration.
>
> "The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted. . . ."[438]

On April 13, 1943, in testifying before a House Naval Affairs Committee in San Francisco, General DeWitt amplified his stand. This time he said:

> "A Jap's a Jap. It makes no difference whether he is an American citizen or not. I don't want any of them. We got them out. They were a dangerous element. The West Coast is too vital and too vulnerable to take any chances. They are a dangerous element, whether loyal or not. It makes no difference whether he is an American citizen. Theoretically, he is still a Japanese and you can't change him. You can't change him by giving him a piece of paper. . . ."[439]

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[437] *New York Times*, June 29, 1942. (Special dispatch of June 28, from San Francisco.)

[438] *Final Report* of General DeWitt, p. 34.

[439] Associated Press Dispatches of April 13, 1943, carried in Metropolitan papers of April 14, 1943; see *Los Angeles Times*, April 14, 1944; *Los Angeles Daily News*, April 14, 1943; *San Francisco Chronicle*, April 14, 1943; and other West Coast papers.

Only one other man has, to our knowledge, used the same figure of speech in complaining that citizenship in his country was not at that time based upon considerations of race. This is Adolph Hitler, who wrote in *Mein Kampf:*

> "Today the right of citizenship is acquired, as above mentioned, primarily by birth within the boundaries of a state. Race or membership in the nation plays no part whatever. A negro who used to live in the German protectorates, and now has a residence in Germany, thus brings a 'German citizen' into the world if he has a child. In the same way any Jewish or Polish, African or Asiatic child can be declared a German citizen without more ado. . . . This conjuring trick is accomplished by a State President. What Heaven could not attempt, one of these Theophrastus Paracelsuses does in the turn of a hand. One scratch of the pen and a Mongolian ragamuffin is suddenly turned into a real 'German.'"[440]

Finally, we have it on the authority of Dr. Galen Fisher, that General DeWitt refused to allow hearings for persons of Japanese ancestry, because "it would be practically impossible to establish the loyalty of anyone of Japanese race."[441]

In his concurring opinion in the *Hirabayashi* case, Mr. Justice Douglas wrote: "We must credit the military with as much good faith . . . as we would any other public official acting pursuant to his duties."[442] We do not doubt the good faith of General DeWitt. We do not

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[440] Adolph Hitler, *Mein Kampf*, Stackpole Sons, 1939 edition, pp. 424-25

[441] Galen M. Fisher, "The Drama of Japanese Evacuation," *A Touchstone of Democracy*, p. 17.

[442] *Hirabayashi v. United States*, p. 106.

doubt the good faith and burning fanaticism of Adolph Hitler in his belief that the Jews of Germany must be removed and eliminated, and that no act of theirs could attest to their worth. But we do question the outlook upon which the faith of these men is based. The faith of the men who said "A Jap's a Jap." is not the faith of the man who wrote: "Loyalty is a matter of mind and of heart not of race. That indeed is the history of America. Moreover, guilt is personal under our constitutional system."[443] It is not the faith of the Court which proclaimed, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[444] It is not the faith of the man who asserted, "Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals."[445] We can only ask that in the decision now before them the members of this Court will keep that high faith which is the finest tradition of our land.

Respectfully submitted,

SABURO KIDO,
Japanese American Citizens League,
Beason Building,
Salt Lake City 1, Utah;

A. L. WIRIN,
257 South Spring Street,
Los Angeles 12, California;

Counsel, Japanese Americans Citizens League, Amicus Curiae.

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[443] *Ibid.*, pp. 107-08.
[444] *Ibid.*, p. 100.
[445] *Ibid.*, p. 110.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

The American Civil Liberties Union filed briefs *amicus curiae* with this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, and *Yasui* v. *United States*, 320 U. S. 115, because the Union believes that it is of the highest importance that there be definite boundaries set in regard to the power of the military over civilians. This case can and should furnish a further occasion for marking out that boundary more precisely. Although this Court upheld the *Hirabayashi* conviction, it confined its opinion to the curfew restriction. The issue of the detention of persons of Japanese ancestry

—citizens and aliens alike—was not considered. That issue the Union deems of vital importance. It can and should be determined in the case at bar.

I

The Issue in This Case Is the Validity of Military Detention under Armed Guard of Civilian Citizens of Japanese Ancestry.

The United States, the respondent in this proceeding, attempts to sustain the conviction of petitioner by seeking to persuade this Court that the issue before it is solely one of the validity of the evacuation of persons of Japanese ancestry from certain areas on the Pacific Coast. We believe, with petitioner, that this evacuation was without adequate military justification, and in itself was a deprivation of his constitutional rights. But we also believe, and will seek to demonstrate below, that the true issue here is more serious even than that. The true issue posed by this case is whether or not a citizen of the United States may, because he is of Japanese ancestry, be confined in barbed wire stockades euphemistically termed Assembly Centers or Relocation Centers—actually concentration camps. Because petitioner refused to submit to such treatment, he has been adjudged guilty of a crime. The Union believes that such a judgment must not be allowed to stand.

The Background Facts

The true issue inevitably emerges when the events which led up to petitioner's arrest are clearly stated. At the risk of repeating in some measure the recitations in the opinion in *Hirabayashi* v. *United States*, 320 U. S. 81, 85-90, we begin at the beginning.

Japan bombed Pearl Harbor on December 7, 1941; one day later Congress declared war on Japan. 55 Stat. 795.

Over two months later, on February 19, 1942, the President promulgated Executive Order No. 9066 (7 Fed. Reg. 1407). By that Order, the President purported to—

> "authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion."

On February 20, 1942, the Secretary of War designated Lt. General J. L. DeWitt as Military Commander of the Western Defense Command. On March 2, 1942, General DeWitt promulgated Public Proclamation No. 1 (published in the Federal Register for March 26, 7 Fed. Reg. 2320). This proclamation recited that the entire Pacific Coast—"by its geographical location is particularly subject to attack, to attempted invasion • • • and, in connection therewith, is subject to espionage and acts of sabotage." It further recited that "as a matter of military necessity" certain Military Areas and Zones were established, and stated (Par. 4)—

> "Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A-2 to A-99 inclusive, as are within Military Area No. 2."

In the meantime, any Japanese, German or Italian alien, or "any person of Japanese ancestry" then residing in Military Area No. 1 who changed his place of habitual residence was required to obtain and execute a change of resi-

dence notice. Military Area No. 1, as defined in the maps accompanying the proclamation, included all of the coastal portions of California, including the City of San Leandro, Alameda County, where petitioner resided. By Public Proclamation No. 2 of March 16, 1942 (published in the Federal Register of March 28, 1942, 7 Fed. Reg. 2405), the military areas and zones were extended to cover the balance of the Western Defense Command area of the eight western states.

Congress entered the picture on March 21, 1942. The Act of that date (56 Stat. 173) provided that anyone who knowingly "shall enter, remain in, leave, or commit any act in any military area or military zone prescribed * * * by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander" shall be guilty of a misdemeanor.

On March 24, 1942, General DeWitt promulgated Public Proclamation No. 3, which imposed the curfew restrictions upheld in *Hirabayashi* v. *United States*, 320 U. S. 81. On the same day, he began the issuance of a series of Civilian Exclusion Orders, each relating to a specified area. That relating to petitioner is Civilian Exclusion Order No. 34 (7 Fed. Reg. 3967.) Before that was issued, General DeWitt had promulgated Public Proclamation No. 4 on March 27, 1942. That order recited that—

> "it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration"

and, therefore, ordered that as of March 29, 1942—

> "all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be

> and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."

By March 29, 1942, therefore, petitioner was by military order confined to the limits of Military Area No. 1. This is important in understanding the consequences to petitioner of Civilian Exclusion Order No. 34.

This Order was issued on May 3, 1942 (7 Fed. Reg. 3967). From and after noon, May 8, 1942, it ordered that "all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1" described by boundaries, and including San Leandro, where petitioner resided. The Order further provided (Par. 2) that a responsible member of each family, and each individual living alone, who were covered by the terms of the Order, should report to the Civil Control Station at 920 C Street, Hayward, California (within the limits of Zone 34), between 8:00 A. M. and 5:00 P. M. on May 4 or 5, 1942. Paragraph 4 of the Order excepted from its provisions—

> "all persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters while those persons are in such Assembly Center."

Contemporaneously with Civilian Exclusion Order No. 34, however, there were issued and effective "Instructions to All Persons of Japanese Ancestry" living in the area involved.[1] By these "Instructions" it was further provided that from noon, May 3, 1942, no Japanese person living in the area would be allowed to change residence

[1] A specimen "Instructions to All Persons of Japanese Ancestry" is contained in *Japanese Evacuation From the West Coast* (G.P.O.), pp. 99-100. This volume is General DeWitt's Report, transmitted by him to the Chief of Staff, and by him to the Secretary of War, but released to the public only in January, 1944. It is referred to hereafter as "DeWitt Report".

without special permission from the Commanding General, with the further provision that no such permits would be granted except for the purpose of uniting members of a family, or in cases of grave emergency.

Petitioner was thus, on and after May 3, 1942, prevented by law from leaving the limited area of Zone 34.

The purpose of the report to the Civil Control Station, as explained in the DeWitt Report, was "to receive further instructions" on the "evacuation" (p. 100). Had petitioner reported, he would, as described in the Report (pp. 118-126) have been given all of the papers necessary for "evacuation" in an envelope which bore his "family number." He would have been interrogated about his family history, his personal and business affairs, and would have been given an appointment for a medical examination. At the time of this later examination he would have been told of the scheduled date and hour for his departure for Tanforan. The date, hour, place and coach or bus number would have been written on his identification tag. This oral information, in fact, would have been the only order to leave that he would ever have received. He would have gone to Tanforan, in Zone 35, and would have been confined there, both by barbed wire stockades and armed guards and also by reason of the fact that under the terms of Civilian Exclusion Order 35, issued contemporaneously with Order 34, it was made illegal for him to be anywhere in Zone 35 except within the limits of the Tanforan Assembly Center after May 8, 1942.

One more element of the background facts is that pertaining to the War Relocation Authority. This was established by Executive Order No. 9102, issued by the President on March 18, 1942 (7 Fed. Reg. 2165). That Order established the Authority, and authorized its Director to formulate a program for the removal, relocation, maintenance and supervision of the persons authorized to be excluded

under Executive Order No. 9066. Thereafter, the persons ordered excluded by General DeWitt were generally sent first to Assembly Centers operated by the Army, and thence to the so-called Relocation Centers—concentration camps—operated by the War Relocation Authority.

Finally, there are the regulations specifically applicable to the Assembly or Relocation Centers. General DeWitt issued Civilian Restrictive Order No. 1 on May 19, 1942. By this order the internees were prohibited from leaving any such centers without specific authorization.[2] The Civilian Restrictive Order stated (published on January 21, 1943, in 8 Fed. Reg. 982):

> "That all persons of Japanese Ancestry, both alien and non-alien, who now or hereafter shall reside, pursuant to exclusion orders and instructions from this headquarters, within the bounds of established assembly centers, reception centers or relocation centers * * * shall during the period of such residence be subject to the following regulations:
>
> "(a) All such persons are required to remain within the bounds of assembly centers, reception centers, or relocation centers at all times unless specifically authorized to leave as set forth in paragraph (b) hereof.
>
> "(b) Any such person, before leaving any of these centers, must first obtain a written authorization executed by or pursuant to the express authority of this headquarters setting forth the hour of departure and the hour of return and the terms and conditions upon which said authorization has been granted.

[2] This was, of course, already the practical effect of the prior orders so far as persons like petitioner were concerned. Such persons were sent under military guard to Tanforan, itself inside Military Area No. 1 and inside Zone 35, from which all persons of Japanese ancestry were excluded after May 8, 1942 by Civilian Exclusion Order No. 35. Hence persons of Japanese ancestry could not leave Tanforan without entering the forbidden parts of Zone 35 and thus violating the prior orders.

"2. Any person subject to this order who fails to comply with any of its provisions or with the provisions of the published instructions pertaining thereto will be liable to the penalties and liabilities provided by law."

On June 27, 1942, General DeWitt issued Public Proclamation No. 8 (7 Fed. Reg. 8346), which designated all relocation centers then or thereafter established within the Western Defense Command as War Relocation Project Areas, and imposed the same restrictions with respect to them as were imposed by the Civilian Restrictive Order of May 19, 1942, above quoted.[3]

The leave permits referred to in these orders deserve brief reference. The first formulation of rules was in Administrative Instruction No. 22 of the War Relocation Authority issued on July 20, 1942. In general, the Administrative Instruction provided that any person could apply for a permit to leave the center if he could show that he had a specific job opportunity with a prospective employer at a designated place outside the relocation center and outside the Western Defense Command. The Instruction also provided for an investigation of each such applicant, and that any permit granted could be revoked if the Director of the War Relocation Authority found it necessary in the public interest.

Petitioner's Alleged Crime

Such, then, in broad outline, is the frame of reference within which this Court must determine whether petitioner has been guilty of a crime. In the court below, the majority viewed the case as simply one in which petitioner remained in that portion of Military Area No. 1 covered by Exclusion

[3] On August 13, 1942, the Secretary of War, by Public Proclamation No. WD-1, imposed similar restrictions with respect to relocation centers outside the Western Defense Command area (7 Fed. Reg. 6593).

Order No. 34 after noon on May 8, 1942, specifically, on May 30, 1942, and was properly found guilty because the *exclusion* was proper. Judge Denman, on the other hand, saw in the series of Orders which have been described above a unified plan which was intended to, and which immediately and inevitably would have forced petitioner into enforced confinement at an Assembly Center (Tanforan) and later at a Relocation Center. Judge Denman recognized that only if petitioner could legally have been forced to submit to such confinement can he be said to have been guilty of a crime in remaining in Zone 34. Because of his conclusion that even this was constitutional, he concurred in the majority opinion. We submit that Judge Denman was completely correct in his analysis of petitioner's position; we wholly disagree with his conclusion.

When Public Proclamation No. 1 was issued, petitioner made no move to leave his home. He remained in San Leandro, as he unquestionably had every right to do. Indeed, he was actually given no warning by that proclamation that he would ever have to move, since it was not addressed to any specific group, but simply served notice that exclusion would later be ordered of "such persons or classes of persons as the situation might require." Petitioner, as a loyal American citizen (as he admittedly is) certainly need not have assumed that he would be affected. On and after March 24, 1942, he became subject to, and presumably obeyed, the curfew regulations contained in Public Proclamation No. 3. *Before he was ever told, however, that he would have to leave his home, he was forbidden by Public Proclamation No. 4 to leave the Pacific Coast.* He had never a choice between ignoring or obeying a warning to leave voluntarily. From March 27 onward, petitioner was helpless to avoid the consequences of his Japanese ancestry without violating the terms of some order.

His situation materially worsened on May 3, 1942. On that date, by the terms of Civilian Exclusion Order No. 34, he was ordered to report to the Civilian Control Station on May 4 or 5, 1942. By the contemporaneous mandatory Instructions, he was, in the meantime, forbidden to leave the territory covered by Civilian Exclusion Order No. 34, and at the same time he was also forbidden to remain in that territory, after May 8, 1942. At this point he rebelled. He did not report, nor did he leave San Leandro. He was still there when arrested on May 30.

But for the fact that the Government makes an argument to the contrary, we should feel that we were attacking a straw man in arguing that petitioner cannot stand convicted unless he could legally be required to submit to internment. The Government cannot, and does not (Brief, p. 28), deny that petitioner had but two choices—to violate the Order and mandatory Instructions, or to submit to internment for an indeterminate period of time. And they were not remote choices, nor were they in any degree hypothetical. They were immediate and inevitable.

Yet after making that admission, the Government's argument proceeds just as it would in a case in which the defendant had a third choice—to leave the area and avoid *either* internment or violation of the Order: Had that choice existed, we would have quite a different case. Had that choice existed, the Government could argue, at least, that for a defendant who stayed on when he should have gone away, *exclusion* would be the sole issue.[4] But *this is not that*

[4] Even under such circumstances, we believe that the Government would probably fail in its contention. The *detention* was so inextricably intertwined in the whole program that it is scarcely possible to judge the legality of *evacuation* without considering the other aspects of the program with which it was so intimately related. The fact of greatest significance is that, with the exception of one group of 257 persons who were allowed five days to move before internment (Gov't Br. p. 7), *no one was ordered to leave and thereafter permitted to choose his manner of leaving.* This

case. Petitioner had no such choice. His choice was either to violate the Order and Instructions or to accept imprisonment. By every rational principle, he must now be able to question the validity of that imprisonment, and to go free of the stigma of criminal conviction if that imprisonment was illegal or unconstitutional.

Actually, we do not overstate the case when we say that in reality there was never any *exclusion* planned at all, and that *internment* was from the beginning the actual objective. We need only bear in mind a few facts. First, persons of Japanese ancestry (except for 257 in Zone 1 in late March, 1942, see note 4, *supra*) never had any choice except to submit to internment. Second, when they were interned, they were not necessarily *evacuated;* four of the ten Relocation Centers were *within* the prescribed area, and the persons sent there have actually never been evacuated.[5] Third, the Government now states in its brief (p. 55) that it would have been equally contrary to the program if persons of Japanese ancestry had simply been shifted to the interior, *i. e.*, evacuated with nothing more. Therefore, the Government argues that imprisonment of the evacuees was essential. Could there be better proof than this that the real program, the heart of the whole plan, was *internment*.

Court said in *Hirabayashi* v. *United States*, 320 U. S. 81, 103, the entire series of Proclamations and Orders are "parts of a single program and must be judged as such." Here we have parts of a single Order, and the DeWitt Report leaves no doubt as to the complete intergration and interdependence of evacuation and internment. See, *e. g.*, pp. 78, 92, 94, 118-126.

[5] The map opposite page 280 in the DeWitt Report shows four Relocation Centers in Military Area No. 1: Gila River, Colorado River, Manzanar and Tule Lake. The map in the brief filed by the States of California, Oregon and Washington, *amici curiae* (pp. 2-3) is erroneous. Not until a year *after* the plan had been carried out was the boundary of Military Area No. 1 in Arizona adjusted to exclude from it the Relocation Centers at Colorado River and Gila River.

The Government's argument on separability also ignores all of these facts.

But, as we have said above, the salient fact is that this is not an ordinary separability case. It does not raise the question involved in the cases cited by the Government. There the issue is simply whether the statute is such that the portion of it directly involved can stand alone, even if other parts may later be found invalid. If it can, it is "separable", and the validity *vel non* of the other parts can be ignored. Compare *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419, 437. Even on that basis, we believe that Exclusion Order No. 34 is not separable.[6] But here the Government is trying to separate an *inevitable, immediate* consequence. The Government's brief admits that internment was the only way to avoid a violation of the Order, and at the same time argues that it is a "separable" feature. Unless words have lost their ordinary meaning, nothing could have been more *inseparable* than immediate internment.

The Government furnishes its own *reductio ad absurdum*. The brief seems to say (p. 30) that had petitioner violated the Order and Instructions in *another* way—by fleeing—he could then have challenged the validity of the detention provisions. That is simply nonsense. Detention is no more and no less separable from remaining in Zone 34 than from fleeing it.

Loss of liberty, even temporary, is not to be treated lightly. Confinement in a barbed wire stockade under military guard is, or should be, held in horror by us all. Concentration camps, where citizens are sent without warning, without trial, without even individual charges of guilt of anything but ethnic characteristics, should—must—remain the objects of destruction by our armies, not the objects of condonation by our prosecutors and our courts.

[6] See footnote 4, *supra*.

And they are condoned here, glossed over, minimized. The Government's brief suggests that petitioner submit to loss of liberty and then litigate by *habeas corpus*.[7] It should be unnecessary to assume a worse punishment and ask if the answer would be the same, but perhaps in no other way can the issue be made as vivid as it must be. Does the Government urge that American citizens should have submitted to the Orders and Instructions had they contemplated not only barbed wire concentration camps, but chains, hard labor, bread and water, and the whipping post? Does the loss of liberty become less "separable" if it is thus implemented? Does petitioner, who valued his liberty enough to believe that he could not be thus required to submit to loss of it, lose his standing to challenge the Order only because the plan could have been worse? Unless the answer is "No", we have lost a large segment of a precious heritage of freedom.

Nor can the answer be changed by reliance on *Yakus* v. *United States*, 321 U. S. 414, and *Falbo* v. *United States*, 320 U. S. 549, relied on by the Government (pp. 33-34). The *Yakus* case is patently irrelevant; as the Government itself admits (p. 34), it rests upon explicit statutory provisions. The *Falbo* case is likewise beside the point. There the attack was upon the action of administrative authorities in an individual case under a statute the general validity of which was not questioned. The *Falbo* case it-

[7] On the efficacy of *habeas corpus*, it may not be amiss to advert to the results of that course in the case of another American citizen of Japanese ancestry, Mitsuye Endo, whose case is now also before this Court (No. 70). Her petition for a writ of *habeas corpus* was filed on July 13, 1942. Not until *one year later*, on July 2, 1943, was it acted on by the District Court, statutory exhortations to speed to the contrary notwithstanding. Now, 27 months later, she is still seeking her freedom. Yet she is admittedly a wholly loyal American. It may also be proper to advert to the fact that even now, in the *Endo* case, the Government's brief suggests that by reason of her involuntary removal from a Center in California to a Center in Utah, Miss Endo's case has become moot, and she should be required to begin all over again.

self goes to the very verge of judicial self-restraint in administrative review. But whatever may be the rule in cases in which individual administrative decisions are attacked, no one has ever supposed that the general invalidity—constitutional or otherwise—of an entire statutory or administrative setup cannot be appropriately challenged when a defendant is criminally charged with violation of the legislative or administrative mandate. See Mr. Justice Rutledge, concurring, in *Falbo* v. *United States*, 320 U. S., at p. 555. Indeed, the Government is not even consistent in its position. It concedes (p. 35) that petitioner may challenge the constitutionality and legality of the exclusion segment of Order No. 34. Fundamentally, therefore, the *Falbo* case, which denied all judicial review, has no application. And if some judicial examination of constitutionality and legality is proper, the *Falbo* case is wholly beside the point as to its scope. The Court in that case was not concerned with separability—the present issue—at all. We submit that the case can safely be put to one side.

The Government also makes a strenuous attempt to impart a national emergency into the case by arguing that petitioner should not now be permitted "to seek indirectly to nullify the vital military measure of exclusion of persons of Japanese ancestry from the West Coast area because of the claimed invalidity of accompanying features of the exclusion program" (p. 31). There are two answers. First, as we have said above, we do not believe that the mass exclusion of citizens of Japanese ancestry from an area equal to a quarter of the entire United States was legal, and we do not believe it will be upheld by this Court when the issue is presented. For that reason, there is no danger in invalidating it now. But second, and more importantly, we do not believe that the validity of exclusion is here involved. The decision by this Court that an il-

legal means—internment—was used in connection with evacuation does not mean that evacuation, *per se*, is illegal. Petitioner here has been excluded in fact. All of the other citizens of Japanese ancestry are now either excluded or confined in concentration camps. Whether they will be permitted to return depends on the validity of the *exclusion*, not on the validity of the *internment*. The Court may proceed to decision with no fear that it will interfere with any action that the Government may *legally* take.

Finally, the Government urges that in any event the petitioner's internment should be split up, and that even if the Assembly Center portion of it be held inseparable, the Relocation Center portion be nevertheless held separable and beyond the scope of proper review in this case. That is hairsplitting with a vengeance. Assembly Centers and Relocation Centers were at all times considered as inseparable concomitants of the internment program. Assembly Centers were admittedly temporary; they served as preliminary concentration camps, in the literal meaning of that term. Before the first Exclusion Order was issued, the War Relocation Authority had been set up on March 18, 1942 (7 Fed. Reg. 2165)—several weeks before the issuance of Exclusion Order No. 34 on May 3, 1942. By May 30, 1942, the date of petitioner's offense, the Relocation Centers had been definitely established as prisons—as internment camps—by Civilian Restrictive Order No. 1 of May 19, 1942. The first evacuees had been sent to Relocation Centers from Assembly Centers on May 26, 1942. The whole program was a thoroughly integrated one; as described in the DeWitt Report (p. 94):

> "In summary, the general plan for controlled movement and relocation provided for three main steps:
>
> "(1) The 'registering and servicing' of evacuees at Civil Control Stations.

"(2) The provision of temporary residence quarters and a minimum of normal community services at Assembly Centers.

"(3) The ultimate transfer of evacuees to Relocation Centers under the administration of the War Relocation Authority."

Indeed, if more proof be needed that the Assembly Centers and the Relocation Centers are in truth inseparable components of the program, it is supplied by the fact that two Assembly Centers—Manzanar and Colorado River—later became Relocation Centers. At Manzanar, the persons who had been "assembled" there were transferred to a Relocation Center by the simple process of transforming their prison from an "Assembly Center" to a "Relocation Center" (DeWitt Report, pp. 246-247, 278). In addition, many "evacuees" never went to Assembly Centers at all; they were transported directly to a Relocation Center (*ibid*).

That no evacuees were in fact moved from Tanforan to a Relocation Center until after May 30, and that there was a possibility (contrary to fact, of course, Government Brief, p. 33) that petitioner might not have been so moved, can have no bearing on the decision. Neither fact justifies, even remotely, the conclusion of the Government (p. 39) that ultimate confinement in a Relocation Center was "hypothetical". It was planned as an integral part of the program, it was carried out as such, and it was fundamental to the whole concept of internment that it should be.

At the minimum, petitioner can raise the full situation as it existed at the date of his alleged violation. On May 30 the Assembly Centers were in full operation, many of the Relocation Centers had been set up and had received their first internees a few days before, and the internment in both Assembly Centers and Relocation Centers had been made

not only certain, but also of unknown length, by the Civilian Restrictive Order No. 1 of May 19. The limitation sought to be imposed by the Government must be rejected.

II

The Internment Which Was for Petitioner the Only Alternative to Violation of the Order Was Both Unauthorized and Unconstitutional.

Once the true issue in this case is understood to be the legality of the internment which petitioner refused to accept, the answer ceases even to be doubtful. We need go no further, in fact, than to the chief law officer of the Government—the Attorney General. Speaking of the internment of American citizens of Japanese descent, the Attorney General testified:

> "And I know of no authority in any Executive order giving them [W. R. A.] the authority, the right, to hold a man against his will in the centers."[8]

And on the issue of constitutionality, even had a grant of such authority been attempted, he stated:

> "The next problem is very much more difficult, and that is the problem of holding or interning an American citizen in a camp after he has been excluded, and that I have the very gravest doubt about, the very gravest doubt, that any government could pick out a citizen on the general ground that his race is a dangerous race and shut him up. I think it is very, very doubtful; constitutionally."[9]

[8] Hearings before a Special Committee on Un-American Activities, House of Representatives, 78th Congress, 1st Session, Vol. 16, p. 10074, December 9, 1943.

[9] *Ibid.* Note that the Attorney General did not really face the problem. It is not a matter of picking out and interning a single citizen, but a problem of the mass internment of thousands of citizens, and keeping them interned even after investigation has revealed that they are not dangerous.

Why the Government now repudiates its Attorney General, and argues (pp. 44-47) that there was a purported grant of authority to intern American citizens in concentration camps, we do not know. But there is little doubt that he was correct in denying its existence. Executive Order No. 9066 of February 19, 1942, related solely to evacuation. It was founded upon a recital of the necessity for "every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." At the time it was issued, no one contemplated that any American citizens were to be imprisoned as a consequence of whatever evacuation might be necessary. The summary of events leading up to the promulgation of the Order which is set out in the DeWitt Report (pp. 25-38) make this clear.

By the same token, the Act of March 21, 1942 (56 Stat. 173), which was passed to implement this Order, contemplated only evacuation, not detention. *Hirabayashi* v. *United States*, 320 U. S. 81, 90-91.

The only other possible purported authority for intern-

Note, too, the concurrence in the Attorney General's views of the Director of War Mobilization, a former Justice of this Court (*Segregation of Loyal and Disloyal Japanese in Relocation Centers*, Sen. Doc. No. 96, 78th Cong., 1st Sess., pp. 19-20):

> "The detention or internment of citizens of the United States against whom no charges of disloyalty or subversiveness have been made, or can be made, for longer than the minimum period necessary to screen the loyal from the disloyal, and to provide the necessary guidance for relocation, is beyond the power of the War Relocation Authority. In the first place, neither the Congress nor the President has directed the War Relocation Authority to carry out such detention or internment. Secondly, lawyers will readily agree that an attempt to authorize such confinement would be very hard to reconcile with the constitutional rights of citizens."

The Secretary of the Interior has also expressed the same view in a Statement released on April 13, 1944, in which he stated: "I believe that the only justifiable reason for confinement of a citizen in a democratic nation is the evidence that the individual might endanger the wartime security of the nation."

ment of American citizens is Executive Order No. 9102, of March 18, 1942. Significantly, the Government does not rely upon this Order. It was clearly designed "to provide for removal from designated areas of persons whose removal is necessary in the interest of national security", and for "their relocation, maintenance, and supervision". No detention, no internment behind barbed wire with the usual concomitant of armed guards, is suggested or even hinted at.

The only argument the Government makes to the contrary is based upon the idea that (p. 46) "detention was a collateral measure closely related to the exclusion and, as such, came within the purpose as well as the literal terms of Executive Order No. 9066."

It is difficult to know how to express strongly enough the utter abhorrence of that suggestion. That means, in simple English, that as a sort of by-product of another grant—as an inferential, peripheral, supplemental power—citizens can be herded behind barbed wire, guarded with men armed with machine guns, and all without any charge of crime against them, much less a finding of guilt. That means, indeed, that citizens can, as a sort of an unimportant collateral consequence of evacuation, be kept in such concentration camps *even after they have been fully cleared of all charges.*[10] Short of the power of arbitrary life and death, the one power which certainly cannot be inferred is the power to deprive a citizen of his liberty.

Besides, the suggestion is silly on its face. Concede that compulsory evacuation requires assistance to the evacuees. Concede that minimal concern with the welfare of the citizens thus uprooted made Government provision for their welfare necessary. Centers where food, shelter, and the

[10] That is the case with Miss Endo, for example (No. 70, Oct. Term, 1944).

like were freely available were the least that could have been supplied. But what possible basis can there be for turning these shelters into prisons? What possible ground can be advanced for the collateral necessity for a program of mass imprisonment—not temporary, but now for over two years? What possible grounds exist for drawing an inference that evacuation required barbed wire enclosures, peon wages, machine guns? Such questions need no answers.

Moreover, constitutionally, even had a purported grant of such power been made, there can be no question that it would have been utterly void. The Attorney General's "very gravest doubt" on a less drastic problem (see note 9, *supra*) is fully warranted.

Fully to express our view, we must revert, for the moment, from internment to evacuation. By a brief summary of the reasons which compel a belief in the invalidity of mass evacuation, we can illustrate more clearly the utter lack of any warrant for the concomitant internment of the "evacuees".

Even as far as *evacuation* is concerned, there is every reason to believe that the alleged military necessity for the complete evacuation of all persons of Japanese ancestry from the Pacific Coast never existed. We can presume, of course, that the Army did not start from scratch in its plans for the defense of the Pacific Coast before December 7, 1941. On that day, by Presidential proclamation, the Attorney General was given the authority to evacuate any Japanese alien from any military area anywhere in the United States (DeWitt Report, p. 1). Yet the DeWitt report itself states (p. 6) that not until January 21, 1942, did the Commanding General of the Western Defense Command refer any recommendations for the creation of such areas to the War Department. If military necessity was the reason for complete evacuation, what was the General

doing during those six weeks? Furthermore, what is the explanation for the fact that the 99 areas which he recommended be created in California did not cover all of the State, or even all of its coast, and required the moving of only about 12,000 persons, of whom about half were alien Germans and Italians? It is a strange thing that a military necessity which required the complete evacuation of all persons of Japanese descent in March required the evacuation of only 6,000 on January 21.

General DeWitt does try to show military necessity by reference to reported illegal radio signals which could not be located, lights on the shore, and the like (Report, Ch. 2). The Government's brief (p. 11n.) states, however: "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the court to take judicial notice, and we rely upon the Final (DeWitt) Report only to the extent that it relates to such facts." This singular repudiation of General DeWitt's testimony on the military necessities, which obvioasly could be required only by the existence of reliable conflicting information from other sources, is made even more remarkable by comparison of the Government's brief and Chapter II of the DeWitt Report. The brief (pp. 20-26) contains no reference, for example, to illicit radio signals (DeWitt Report, p. 8), signal lights visible from the Coast (*ibid.*), or to the significance attached by the Report to hidden caches of contraband (*ibid.*), location of Japanese settlements near defense installations (*id.*, p. 9), fascistic or militaristic pro-Japanese organizations and Emperor-worshiping program (*id.*, p. 10), and Japanese language schools (*id.*, pp. 12-13). Moreover, in several respects the recital in the DeWitt Report is wholly inconsistent with other facts of public knowledge. It is well known, of course, that radio detection equipment is unbelievably accurate; a "fix" can be obtained which will locate a

radio transmitter not only in a specific house, but in a specific room. Secondly, the fact that no person of Japanese ancestry has been arraigned for any sabotage or espionage since December 7, 1941, certainly suggests, in view of the unquestionable efficiency of the F. B. I., that no such acts were committed by such persons. Nor can it be said to be wholly without significance that in four of the five cases in which, during this war, trial courts have taken testimony on alleged military necessity for action against civilians (by direct testimony of military authorities), the asserted military necessity has been found not to exist in fact. *Schaeffer* v. *Drum*, 51 F. Supp. 383 (E. D. Pa.); *Ebel* v. *Drum*, 52 F. Supp. 189 (D. Mass.); *Wilcox* v. *DeWitt* (S. D. Calif.) (*contra*); *Schwarzberg* v. *Grunert* (E. D. Pa.); *United States* ex rel. *Duncan* v. *Kahanamoku* (D. Hawaii).

But what is in the DeWitt Report and not in the Government's brief is scarcely less significant than what is not in the DeWitt Report. The Report is 600 pages long and is extraordinarily detailed. It has many pages of photographs of Assembly Center doings—"a teen-age orchestra tuning up"; "a watermelon-eating contest." It has statistics on the number of Japanese who died of non-venereal genito-urinary diseases in the period from 1937-1941 (p. 204); and that 40 pounds of fish (frozen with heads off) were allowed per 100 persons per meal (p. 187). Yet nowhere in a volume obviously designed as an apologia for the greatest compulsory mass migration in our history is there a line, a word, about the reports of other security officers. General DeWitt does not tell us whether he consulted either the Director of the Federal Bureau of Investigation or the Director of the Office of Naval Intelligence. Before the enormously drastic, difficult and expensive step of mass evacuation was recommended, one would suppose that General DeWitt would have sought information from these other sources as to whether their investigation of the

ersons of Japanese ancestry on the Pacific Coast indi-
ted that the population *as a whole* was so dangerous that
must be wholly evacuated, and whether they could assist
some less drastic solution. If the Office of Naval Intel-
gence and the Director of the Federal Bureau of Inves-
gation recommended complete evacuation, undoubtedly
at would have been mentioned in the DeWitt Report. It
rints much of the correspondence and memoranda that
ere exchanged during this period. Since no recommenda-
ons from either the O. N. I. or the F. B. I. are referred to,
e can only assume either that they were not sought or
at they were opposed to mass evacuation.[11] In either
se, the inference becomes overwhelmingly strong that
hat was involved was not military security but race pre-
dice and hysteria generated in late January and Feb-
ary, 1942, by a small but vocal group on the Pacific
oast. The briefs filed by the Government and by the

[11] There is a fair indication that, whether or not its recommendations were asked, the O.N.I. would have stated that mass evacuation was wholly unnecessary. In *Harper's Magazine* for October, 1942 (pp. 389-497), here is an article by an anonymous officer described as having been prepared in May, 1942, by an intelligence officer who for a number of ars was stationed on the West Coast and who during that time made a rticular study of the Japanese population," and that it was written a confidential memorandum and released with Government assent. nce it is safe to assume that the Army would not have released it, d since F.B.I. men are not usually referred to as "officers"; it is almost tainly from O.N.I., which has always been understood as primarily con ned with Japanese intelligence work. The concluding paragraph of article states (p. 497):

"To sum up: The entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people. It should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis."

view of all of these facts, we believe the Court must assume that no urity reports existed which recommended mass evacuation, unless the ernment, which has all of the facts in its possession, now says that do exist.

Pacific Coast States in this and the *Endo* cases constantly refer to the existence of both of these factors.[12]

How else can one explain the difference between the treatment of citizens of Japanese parentage on the Pacific Coast and in Hawaii. Hawaii was more gravely threatened than the Coast, and it was plainly more important to guard in the Islands against subversive persons. Yet there were no mass evacuations or internments of persons of Japanese ancestry in Hawaii, notwithstanding the fact that there were more of them there, concentrated around our greatest naval base, than there were in the whole of the Pacific coastal strip.[13]

Finally, apart from the fact that the DeWitt Report is thus a wholly untrustworthy recitation, the fact is apparent that even its own statements make no showing of the necessity for complete evacuation of all persons of Japanese ancestry from a huge area. A military necessity for some action does not support a military necessity for *any* meas-

[12] There is a significant correlation between the date upon which complete evacuation was decided upon and the dates when agitation of this sort against the West Coast Japanese reached the hysteria stage. Pearl Harbor created no immediate problem; not until late January and early February of 1942 did certain organizations and newspapers begin to agitate for drastic measures. See House Report No. 1911, Report of Select Committee Investigating National Defense Migration, 77th Cong., 2d Sess. (1942), p. 2; *e. g.*, statement of American Legion of California in Los Angeles Evening Herald Express, January 27, 1942; resolution of Ventura County Board of Supervisors, Los Angeles Times, February 4, 1942; proposal of Los Angeles County Defense Council, Los Angeles Examiner, February 12, 1942; resolution of American Legion University Post No. 41, Seattle Times, February 18, 1942. Generally, this element of the press favored complete military action. See editorial, Los Angeles Times, January 28, 1942. On February 13, 1942, the entire West Coast Congressional Delegation expressed its recommendation for drastic and prompt action in a letter to the President. House Report No. 1911, *supra*, p. 3. On February 14, General DeWitt recommended complete evacuation (Report, p. 33), and the promulgation of Executive Order No. 9066 followed on February 19.

[13] No acts of sabotage have been reported in Hawaii since December 7, 1941. House Report No. 1911, *supra*, note 12, pp. 48-58.

ise, no matter how drastic. How can military necessity require the evacuation of over a hundred thousand persons from the Pacific Coast and only a handful from Hawaii?

We should emphasize that we are not now seeking to review the action of the Court in the *Hirabayashi* case. There, the Court was forced to speculate upon the military needs, since no statement of them had yet been made. Now we have in the DeWitt Report a complete explanation, apologia, and it is wholly proper that former speculative conclusions should be reexamined in the light of the facts.

But if there is every reason to believe that there was no military necessity for *evacuation*, there is no doubt at all that there was no military necessity for the subsequent *imprisonment* of the evacuees. We can take General DeWitt's word for it, for he states (Report, p. 43):

> "Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated."

The *only* justification for imprisonment of American citizens is stated to be the unwillingness of other states and communities to accept them, and the consequent fear of resulting disturbances in the interior states. See also pp. 101, 104, 105. See Government's Brief, pp. 52-53.[14]

We believe that even this reason is magnified out of all proportion to reality. But we need not explore that. The significant fact is that this Court is asked to sanction the

[14] The suggestion by the Government that there *was* a military necessity of preventing sabotage and espionage in the interior (Brief, p. 55) is worth nothing. Whatever may be the privilege of the Government in arguing what military necessities *might* be when they are unknown, there certainly is no warrant, when the reasons *are* known, for asserting *new reasons never advanced by the military authorities*, as the Government admits (p. 55n).

act of imprisoning American citizens without charges, without trial, without conviction, without any safeguards whatever, *because it is asserted that it is sociologically desirable*. And at the risk of tiresome repetition, we should point out again that even this reason carries no shadow of justification for more than a plan of voluntary refuge for evacuees: *internment* was wholly unnecessary. If this can be permitted under the Constitution, much of Germany's anti-Semitic program can be duplicated in this country with no violation of constitutional rights.[15]

And this internment has not been temporary. Both the exclusion and the internment of persons of Japanese ancestry have continued for over two years. Persons of unquestioned loyalty, who have been through the most intensive investigation and found not wanting in any respect, still remain confined by machine guns to their camps. When a program is continued practically unchanged beyond the need which is alleged to have brought it into existence, the most compelling inference is that the alleged basis is not the true basis at all. The true basis, as we have said above, was hysteria, race prejudice, and a vocal minority which high-pressured a military need for the security measures found adequate elsewhere—as in Hawaii—into a mass uprooting and internment of tens of thousands of innocent persons.

Conclusion.

We believe that unquestionably, therefore, the internment to which petitioner would have been required to submit was unauthorized and unconstitutional. We believe that the

[15] The Attorney General, at least, is not willing to have the Constitution thus interpreted. In a speech to the Jewish Theological Seminary of America entitled "Democracy and Racial Minority" on November 11, 1943 he is reported as stating (*Common Ground*, Vol. IV, No. 2, p. 5):

> "The War Relocation Authority has no power to intern American citizens; and constitutionally it is hard to believe that any such authority could be granted to the Government."

evacuation itself, had it stood alone, was likewise unconstitutional as far beyond any conceivable military necessity. Petitioner's conviction must be reversed.

This Court cannot ignore the implications of this case. We are living under a Constitution which secures all citizens certain inalienable rights. Yet despite that Constitution, a program of imprisonment of citizens has been carried out by the Government for over two years. Only a reassertion of our constitutional guaranties by this Court can give us assurance that they are not fatally ineffective and have not been fatally impaired.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

CAREY MCWILLIAM,
of the California Bar;

EDWIN BORCHARD,
of the Connecticut Bar;

CHARLES A. HORSKY,

GEORGE RUBLEE,
of the District of Columbia Bar;

ARTHUR DEHON HILL,
of the Massachusetts Bar;

WINTHROP WADLEIGH,
of the New Hampshire Bar;

OSMOND K. FRAENKEL,
of the New York Bar.

HAROLD EVANS,

WILLIAM DRAPER LEWIS,

THOMAS RAEBURN WHITE,
of the Pennsylvania Bar.

Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A REHEARING.

WAYNE M. COLLINS,
Mills Tower, San Francisco 4, California,
Counsel for Petitioner.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Fred Toyosaburo Korematsu, demands a rehearing of the within cause upon the following grounds:

I.

CONSEQUENCES OF THE MAJORITY OPINION.

Far better were it that the grim lines of the incredible majority opinion herein never had been written than that they might stand as a judicial precedent justifying not only the summary deprivation of the liberties of the petitioner and other unfortunate citizens but also those of future generations of citizens on the fiction of race and other irrelevant bases. That opinion seems to be founded on the assumption that liberty was our affliction and that our pursuit of a legal right was a painful symptom for which no remedy exists. If it is to stand it will serve but to demonstrate that equality before the law is a mere abstraction and not a fact. It is not an acceptable judicial pronouncement from a tribunal entrusted with the duty of preserving constitutional guaranties. It is the first historic example in which this Court has rejected the concept of the Constitution as a shield and adopted the view that it is a sword that may be wielded without remorse against citizens and classes of citizens. The decision paves the road down which even now a regimented people is being compelled to march unwittingly to state-socialism or state-capitalism. If military control over civilians is to be unlimited we might as well openly declare in favor of a modern police-state patterned after the old Byzantine law or Visigothic code. Citizen Korematsu deserved a better fate at the hands of this, his Court, than he has encountered, wherefore we trouble you to grant a rehearing of his cause, to withdraw the opinion and to

reverse the judgment below. This is the only chance this Court will have to abrogate the dangerous doctrine of inequality announced by the majority opinion. What we require is a reiteration of faith in those fundamental liberties considered inviolate by our Founding Fathers and incorporated in the Constitution they wrote not merely for the benefit of their generation but for this and coming generations of citizens as well.

II.

COURT OVERLOOKED CONFLICT IN ORDERS REQUIRING PETITIONER BOTH TO CONFINE HIMSELF TO AREA AND TO LEAVE THE AREA.

The majority opinion concludes that the order of March 27, 1942 (Public Proclamation No. 4; 7 F.R. 2601), forbidding the petitioner to leave the area and that of May 3, 1942 (Civilian Exclusion Order No. 34), ordering him to leave it through the assembly center route did not contain contradictory commands because the former, by its own express terms, was supplanted by the latter. However, what the Court overlooked was that there were, nevertheless, two contradictory orders outstanding on May 20, 1942, when the information was filed against the petitioner, one forbidding him to leave the area which was not supplanted and one commanding him to leave. The effect of these two orders was neither considered nor passed upon by this Court although the validity of each was in issue.

Public Proclamation No. 3 (7 F.R. 2453) of March 24, 1942, was in full force and effect on May 20, 1942.

It was not supplanted. It remained in full force and effect until January 2, 1945, when it, along with other military orders issued by General DeWitt, was revoked specifically by General H. C. Pratt in Public Proclamation No. 21 issued on December 17, 1944. It commanded the petitioner to confine himself to his home between the hours of 8 P.M. and 6 A.M. and commanded him to stay in and not remove himself beyond a five mile radius from his place of residence in the following language:

> "2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence."

Section 4 thereof makes a violation of section 2 punishable as a misdemeanor under Public Law No. 503. This order does not contain a proviso limiting its effect in time as does Public Proclamation No. 4 of March 27, 1942, which was discussed by the Court. It commanded the petitioner to remain within the five mile circumscribed area and not to leave it. Civilian Exclusion Order No. 34 of May 3, 1942, commanded him to leave it by the avenue of a Civil Control Station situated in Hayward, Alameda County, California, for the Tanforan Assembly Center situated in San Mateo County, California, a distance exceeding 20 miles from his residence, and destined him to final imprisonment in Topaz, Utah, a thousand miles away. The trap was sprung. It was impossible for him to obey both orders. Both were imprisoning orders. The first imprisoned

him within a small geographical area in the vicinity of his home. The second narrowed the corridor through which he was transported to another cell where he was scheduled to remain for an indefinite period. Although each required diametrically opposite acts the petitioner could not escape punishment. A violation of either was made punishable as a misdemeanor by Public Law No. 503. The majority opinion herein admits "a person cannot be convicted for doing the very thing which it is a crime to fail to do". By virtue of that declaration applied to the facts herein we are entitled to have this petition granted and the judgment reversed.

Detention was inherent in program from its inception.

The majority opinion states that had the petitioner left the forbidden area and gone "to an assembly center" it could not say either as a matter of fact or law that his presence in that center would have resulted "in his detention in a relocation center" because some who reported to the assembly centers were not sent to relocation centers but were released upon condition they remain outside the prohibited zones until the military orders were modified or lifted. We are unable to discover the source of the Court's information upon which these strange conclusions appear to have been based and believe the Court to have been misinformed and in error.

Suffice to say that it was not until March 30, 1942, that General DeWitt first announced that an evacuation "was in prospect for practically all Japanese".

See H.R. 2124, page 165, and press release of the Wartime Civil Control Administration, March 30, 1942. Until that time petitioner had no knowledge he might be evacuated. It is significant, however, that the General already had imprisoned the petitioner within a five mile radius from his home by Public Proclamation No. 3 on March 24, 1942. The petitioner had neither notice nor knowledge that the General intended to evacuate him until May 3rd and never had an opportunity to migrate voluntarily. Those who left the forbidden areas prior to March 24, 1942, did so because they suspected they might be evacuated. A majority of them were aliens. The petitioner had no reason to suspect that the General would desire his evacuation. Why should any loyal citizen suspect any such thing? Further, we know of no instance where a person reporting to an assembly center was not detained thereafter in a relocation center. Neither are we aware of any case of any person reporting to an assembly center being released upon condition of remaining outside the prohibited zone until the military orders were lifted. Perhaps the Court's information upon which it based its conclusion is derived from the respondents' brief in the *Endo* case, page 16, stating that General DeWitt's letter of August 11, 1942, delegated authority to the W.R.A. to issue permits for conditional leave to detained citizens. Although we have not seen the General's letter we are informed by the W.R.A. that it contained a delegation of authority to that agency to release volunteer workers from the camps for temporary periods under special permits in order that

they might harvest perishable crops, that is, to dig potatoes, turnips and beets while under surveillance. The workers were not released from the provisions of the exclusion orders, however, for they were retaken to the camps when their work was finished. Consequently, it must be said that as a matter of fact and of law the presence of petitioner in an assembly center was certain to result in and did result in his detention in a relocation center as it was scheduled to do. The issues framed at the trial under a "not guilty" plea involved not only the petitioner's remaining in the area forbidden by Civilian Exclusion Order No. 34 of May 3, 1942, but also the provisions of Public Proclamation No. 3 of March 24, 1942, which commanded him to remain there.

In the light of the facts the reasons recited in the majority opinion for a refusal to pass upon the validity of the whole imprisoning program, including the original confinement of citizens to designated localities, their removal to assembly centers, their deportation and subsequent detention in relocation centers, each a successive phase of one plan of treatment, lose their support. This Court heretofore has decided that such a program is reviewable in its entirety. See *Hirabayashi v. U. S.*, 320 U. S. 81, and *Lovell v. Griffin*, 303 U. S. 444. Must a program be attacked successively in piecemeal fashion so that in three generations we may have a final declaration that it was a mistake and wholly unconstitutional from inception to completion or that it was constitutional in one part and unconstitutional in another? The Court erred in stating

that to pass upon the validity of the whole program would be to go "beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case". The program involved continuous imprisonment for the petitioner from and after March 24, 1942, at various prisons despite the fact that he had been ordered by Public Proclamation No. 3 to remain in the first on peril of punishment under Public Law No. 503. He was ordered to leave the first by Civilian Exclusion Order No. 34 on May 3, 1942, to report to the second prison for final incarceration in a third at Topaz on peril of like punishment. Consequently, all the "momentous issues" mentioned by the Court were tendered by the "not guilty" plea. It will not do to answer petitioner's contention by stating that it will be time enough "to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him". These very orders were certain to be applied to him and were applied to him. The issues were raised by demurrer to the information, by the not guilty plea and were argued in this Court and the Courts below. The serious constitutional questions involved in this barbarous evacuation program are not avoidable in this case. There never will be another test of the issues in the manner mentioned in the majority opinion because such has been rendered impossible. The assembly centers are closed—the relocation centers, by judicial decision in the *Endo* case, are now converted into protectional camps and proposed

legislation threatens to close them by the middle of the year—and the military mass exclusion orders have been revoked. It will not do for this Court to stamp the program with the label of judicial approval by avoidance of the real issues. This case and the *Endo* case precipitated the revocation of the mass exclusion orders and but for these test cases loyal citizens still would be incarcerated and might have waited until doomsday for deliverance from their plight. What we require now is a declaration that loyal citizens cannot be branded criminal for the exercise of constitutional rights. It is the duty of this Court to declare the statute a bill of attainder.

III.

CAUSE SHOULD BE REMANDED TO TRIAL COURT FOR DETERMINATION OF FACTUAL ISSUES TO PREVENT SUBSTITUTION OF FICTION FOR FACT.

The majority opinion concluded, evidently upon the grounds of which it took judicial knowledge when it considered the *Hirabayashi* case, that the evacuation program did not involve "racial prejudice" but was a military imperative dictated by military necessity and was devised to prevent possible acts of espionage and sabotage. Possibilities are always hypothetical. A necessity exists only when we deal with actualities such as threats, overt acts or omissions. The DeWitt report shows that the only matters which he considered were in the nature of vague potentialities and that he was actuated by personal prejudice. If this Court

entertains the belief that there might have been facts undisclosed by him that might be deemed to form a rational basis for his program it would be its duty to remand the cause to the trial Court for a determination of the issues of fact.

At the trial below the respondents did not meet their burden of proof. The rule long has been established that military action taken against a participant in a rebellion or insurrection is justifiable provided the measures taken are "conceived in good faith, in the face of an emergency, and directly related to the quelling of the disorder or the prevention of its continuance". It is in such cases that a military commander "is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order". Such drastic measures are not conclusively supported by "mere executive fiats" however. See *Sterling v. Constantin*, 287 U. S. 378, and *Moyer v. Peabody*, 212 U. S. 78. The orders violated by the petitioner were mere executive fiats of one of our many generals. They contravened substantial constitutional rights of the petitioner who was proved loyal and not to have been engaged in any criminal or reprehensible act. The taking of judicial knowledge of doubtful matters is not a proper substitute for evidence. It offers no legitimate excuse for the respondent's failure to introduce facts into evidence to sustain its burden of proof on the issue of the military commander's good faith and the factual basis for the necessity claimed to justify the deprivation of fundamental constitutional

rights of the petitioner. If the respondent could have sustained its burden of proof it would have done so at the trial below. If the Court has any doubt that the failure was occasioned by a want of facts supporting the existence of a claimed military necessity justifying the action taken or believes there was a factual basis therefor judicial knowledge ought not to be substituted for concrete evidence and the cause should be remanded for a determination of these issues of fact. It seems to us that the majority opinion says, in effect, that had a general gone so far as to have ordered our federal judges and justices from a forbidden area on the plea that their decisions might have interfered with his plans which arose from an undisclosed military necessity that such action would have been justified in the absence of a declaration of martial law. If such orders would lack constitutionality the orders involved herein lack constitutional sanction.

IV.

INVESTIGATIONS CONDUCTED SUBSEQUENT TO EVACUATION DO NOT CONFIRM BLANKET CHARGE OF DISLOYALTY.

The majority opinion also states that "there were members of the group who retained loyalties to Japan" and that this was confirmed by investigations made "subsequent to the exclusion". The retention of such loyalty on the part of aliens long ineligible to citizenship carries no suggestion that they would have committed any disloyal acts against this nation. If the group contained citizens who preferred loyalty to

Japan it does not follow that they would commit disloyal acts against this nation. The Court also states that subsequent investigation found some five thousand American citizens of Japanese ancestry who "refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan".

The statement of the Court was derived from sources which did not reveal a complete picture of the truth. The frightened internees were asked to fill out a questionnaire. It is to be borne in mind that this questionnaire was required to be filled in by a group of citizens singled out of the whole body of citizens merely because they were of Japanese ancestry. Question No. 28 in DSS-Form 304A asked them to renounce "allegiance or obedience" to the Japanese Emperor. (The same question originally was asked of the aliens ineligible to citizenship but later was revised to ask them to swear "to abide by the laws of the United States and to take no action which would in any way interfere with the war effort of the United States".) The W.R.A. Application For Leave Clearance, Form W.R.A.-126 Rev., contained the same obnoxious Question No. 28. Approximately 5000 of the citizens refused to answer the question at all because such a renunciation involved a false admission of allegiance to Japan. Their failure to answer the question was misinterpreted to indicate that they were attached to Japan.

We draw attention to the fact that this oath was asked of interned citizens who had been denied all the

rights of citizenship without expectancy of relief and who, to all intents and purposes, had been repudiated by their own government. The very oath asked of them carried an admission that they owed allegiance to Japan which allegiance they were to renounce. Renunciation in itself would have involved an admission of attachment to Japan which loyal American citizens viewed as false and could not and would not admit. Would white citizens renounce allegiance to the country of their ancestors when they do not recognize any allegiance except to the United States? Why did not our governmental agencies ask them a simple but fair question, that is, ask them to admit or deny any allegiance or attachment to Japan or any foreign power? The falsity of the charge of wholesale disloyalty is proven by the fact that despite their mistreatment only a few citizens have asked for expatriation and a trifling number of aliens for repatriation to Japan when peace returns. Special legislation recently has been enacted enabling them to exercise this choice. It is significant that since its passage fewer than seventy aliens and citizens have applied for permission to be sent to Japan in the post-war period. These were sent to special alien internment camps during January of this year. In the light of these facts the conclusion of the Court is erroneous and ought to be corrected so that it may not stand in a judicial decision as a permanent brand of disloyalty against innocent citizens.

V.

AUTHORITY TO IMPRISON, EVACUATE AND DETAIN CANNOT BE READ INTO THE STATUTE BY IMPLICATION.

In the *Hirabayashi* case this Court decided that Public Law No. 503 authorized a military commander to establish a curfew on a race discriminating basis. It reached this conclusion because the Secretary of War's letter of March 14, 1942, addressed to the House Committee on Military Affairs (H.R. 2124, p. 168) stated that General DeWitt desired the passage of S. 2352 and H.R. 6758 (Public Law No. 503) to enable the enforcement of "curfews and other restrictions" in military areas. It was on the basis of this indirect notification to Congress that this Court decided that Congress contemplated the establishment of a curfew and, consequently, read into the statute the *implied* intent of Congress to authorize a curfew. However, no like conclusion can be reached concerning the imprisoning program which has been called an evacuation although it involved imprisonment from its inception. The original confinement to small areas, the evacuation and subsequent detention were mere steps in one imprisoning program. Congress does not seem to have been informed that the General intended or desired to institute a generalized imprisonment program. The first notice that any members of Congress had that anyone was to be evacuated was gleaned from the reading of a Washington newspaper report on March 19, 1942, that the General was going to evacuate a limited number of aliens and citizens from the Los Angeles area "early next week". (See 88 Cong. Rec.

2722-26.) The report was erroneous because none were excluded from that area until April 5, 1942, pursuant to Civilian Exclusion Order No. 2. (See H.R. 2124, p. 334.) The congressional committee reports are barren on the subject of evacuation. Consequently, we submit that this Court is unjustified in finding that Congress, either expressly or impliedly, authorized imprisonment, deportation and detention, matters never within its intention or contemplation when it enacted Public Law No. 503. It is significant that on June 18, 1942, S. 2293 providing for the taking into custody of all Japanese was introduced into the Senate and rejected. (88 Cong. Rec. 5317.) On June 22, 1942, the bill was debated and rejected, it being pointed out that the passage of such vicious legislation would constitute "winking at the Constitution". (88 Cong. Rec. 5427-29.)

VI.

THE HIRABAYASHI DECISION IS NOT A PROPER PRECEDENT UPON WHICH TO DETERMINE ISSUES HEREIN.

The majority opinion acknowledges the petitioner challenges the assumptions upon which this Court rested its conclusions in the *Hirabayashi* case. In answer to the challenge the Court relies upon the statement from that case that it could "not reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose numbers and strength could not be precisely and quickly ascertained", a statement made

by the Court long prior to the time General DeWitt's Final Report had been released revealing the error of the conclusion. Nowhere can it be found that Congress ever made any such judgment. Nowhere can it be found that the military authorities ever made any such judgment. Only General DeWitt drew such a conclusion and if his conclusion is to be deemed a judgment it must be considered one divorced from reason, unsupported by fact and founded solely upon prejudice as his letter of February 14, 1942, discloses. (F.R. p. 33.) The Court herein ought not to rely upon the assumptions it made in the *Hirabayashi* case when a rational basis for the program had to be assumed because the General's reasons were treated as military secrets. There are no military secrets that should be kept from the public except matters directly related to the strength and disposition of our forces and the sources and disposition of their supplies. The Final Report itself disputes the assumptions the Court relied upon in the *Hirabayashi* case and proves there was no rational basis for the General's action. This Court ought not to have resorted to the vague and unreliable field of judicial knowledge to support the curfew regulation in the *Hirabayashi* case and ought not now to use that decision as a precedent to determine the issues herein. Such would necessitate a reliance upon fiction for fact to support the General's discriminatory action against citizens.

There was ample time before and during the progress of the evacuation in which the number and strength of disloyal members, if any, could have been

ascertained but no effort was expended in so doing. The Final Report removes any suggestion that the evacuation program had a rational factual basis. It bluntly admits the program was based upon prejudice mingled with suspicion. In actuality there never existed a bona fide military imperative justifying the terrible program. The government has openly admitted on page 57 of its brief herein that the discrimination practiced by the General had no rational basis. The admission reads as follows:

> "In essence, the military judgment that was required in determining upon a program for the evacuation was one with regard to tendencies and probabilities as evidenced by attitudes, opinions, and slight experience, rather than a conclusion based upon objectively ascertainable facts."

Does the Court desire us to believe that the program now can be upheld upon such trifling reasons where the destruction of substantial constitutional rights are involved?

The reasons General DeWitt assigns in justification for his terrible program were collected and assembled in the hodge-podge Final Report long after the program had been carried into execution. They are the products of hindsight and possess the vice of inaccuracy, half-truth and untruth. They prove however that his suspicion and prejudice were erected into a monumental mass of fragile material from which we are to believe a rational basis can be fabricated to justify his colossal military blunder.

The majority opinion also denies that the program was the product of "racial prejudice". General DeWitt's final report, however, demonstrates that it was the product of racial prejudice beyond the shadow of a doubt. (See Final Report, pp. vii-x, 1-39.) His letter of February 14, 1942 (F.R. p. 33), to the Secretary of War reveals that on that date, without evidence of any danger from these people, he nevertheless adopted the arbitrary notion that all Japanese descended persons were "potential" enemies. (F.R. p. 34.) His observers attended the Tolan Committee hearings but neither offered any evidence of disloyalty against these people nor voiced any suspicion of them. His representatives attended the various trials in the Federal District Courts where his orders were challenged but in none of them did they offer any evidence of disloyalty against the defendants or voice any suspicion of them. The respondent is unable to point out a single instance of any act of espionage or sabotage having been committed by any of the excluded citizens or aliens before, during or since the evacuation although such acts could be committed anywhere in the country and the evacuees had and still have opportunities to commit such crimes if so inclined. So have white persons if so inclined. The evacuation was not prompted because of a genuine belief the excluded persons were disloyal but because General DeWitt harbored prejudice against them because of their race.

VII.

NEW AND DANGEROUS PRINCIPLE ESTABLISHED BY MAJORITY OPINION.

In the majority opinion we discover an incredible statement establishing an alien and dangerous principle of law. It reads as follows:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonisms never can."

Apparently, the fiction of race is given a validity it never possessed and does not merit. There are no races in the United States. Mankind is a race but it is not divisible except into nationalities. In this country all citizens possess but one nationality and that nationality is American. If citizens are divisible into groups it can only be on such irrelevancies as size, configuration, pigmentation or situation, none of which justifies discrimination. The curtailment of constitutional rights on a discriminatory basis is not only immediately suspect but is an outright violation of the Constitution.

If discrimination practiced under the color of governmental authority is merely to be suspect and subject to the most rigid scrutiny we are confronted with a strange principle which for the first time crops into juridical thought. Such a principle leaves it to the

individual citizen to guess whether his act or omission is lawful or unlawful and his guess is made dependent upon what this Court long thereafter, on appeal, may decide his rights to be after "the most rigid scrutiny", the plain language of the Constitution and prior judicial interpretation of its provisions to the contrary notwithstanding. This means simply that the Court may decide momentous issues on the caprice of the moment and contrary to precedent. All is left to surmise and to obscurity. The citizen must act at his own peril. How then is anyone to know what his rights are? Must every whimsical command of a military commander be obeyed by civilians and the matter be left to a Court's "most rigid scrutiny" before it can be determined whether it be valid or not? How is a civilian to learn what military orders he must obey and what he may ignore? What is become of civil rights under the Constitution that the citizen must play the part of an anvil to the administration's hammer? A power invoked in wartime that can be rationalized by the Court so as to be asserted to conform to the Constitution can be utilized at all times and find justification on the ground of public emergency, a vagrant term comprehending various forms of crises, political and economic, from one or the other of which we never are free. While expressly denouncing racial prejudice the majority opinion nevertheless upholds its application as though it viewed the affected citizens not as citizens but as part of the landscape. It also sacrifices consistency in declaring that a loyal citizen not charged with crime can be imprisoned

whereas the *Endo* decision declares such a citizen cannot be imprisoned.

It does this tribunal little good and the public a great measure of injury to state that Korematsu, a loyal citizen, was not imprisoned and branded criminal because of his race. On December 17, 1944, General H. C. Pratt, by Public Proclamation No. 21, revoked the mass exclusion orders issued by his predecessor, the revocation taking effect as at January 2, 1945, and obviously being a policy dictated by the War Department. On the same date General Pratt issued a press release admitting his predecessor had based the exclusion on racial grounds, stating therein "it is apparent that the logical and proper course is to terminate mass exclusion based solely on ancestry". The revocation was announced on Sunday the day before this Court handed down its opinions in this and the *Endo* case. On the surface the sudden revocation, timed so perfectly, had the appearance of a face-saving procedure as though it had been adopted because of an anticipated condemnation of the program in the two cases. However, the injury is not undone. Although mass exclusion has been terminated Public Proclamation No. 21 informs us that a system of individual exclusion will act as its substitute. It is by this adroit method that the military authorities may continue to exclude citizens at their whim in the absence of a genuine military necessity for such exclusion. In such circumstances, under the majority opinion herein, a private citizen will have no opportunity to question the validity of the individual exclusion order and no

power to escape its effects. The Court's opinion in the *Endo* case would not be controlling in such an instance because the military authorities arbitrarily might declare the individual disloyal and hold him indefinitely without a hearing on the question of his loyalty. It is little comfort the majority opinions in this and the *Endo* case offer the individual who may incur the enmity or suspicion of a military commander.

VIII.

A CONCENTRATION CAMP IS A CONCENTRATION CAMP.

It is with amazement that we read in the majority opinion that it is unjustifiable to call the assembly and relocation centers by their true names. It is shocking to learn that it is now become distasteful to term a concentration camp a concentration camp. We neither solicited nor deserved the admonition—that truth has become unmentionable. The citizens who were ruthlessly ordered from their homes and thrown into huts and hovels in camps where they have been confined for years, mistreated and forgotten, know them for what they really are. Whatever these camps may be called they are exactly what they were designed to be, what they are conducted as and what they are—concentration camps. The American public is not a kindergarten that it will accept the notion that these shameful prisons are sanctuaries. The narration of a few incidents may present them in their true light.

On December 6, 1942, two young evacuees were shot dead and nine wounded by military police at Manzanar for congregating in a crowd. A few newspapers which value rumors higher than the truth because of what has been termed "story-value" were quick to spread the ugly but false report that the incident had been provoked by disloyal internees. There was nothing sinister in the assemblage however. Its purpose was petitioning the W.R.A. officials for redress of wrongs, a matter we have been taught was guaranteed by the First Amendment. (See W.R.A. Quarterly Report, Oct. 1 to Dec. 31, 1942, pp. 37-38.) Evidently the right to intern loyal citizens also carries the right to shoot them with impunity. The fact that the camp was converted into the appearance of an abattoir impresses us as one of the characteristics of a typical concentration camp.

On November 4, 1943, eighteen evacuees in the Tule Lake Center were treated for injuries received at the hands of special police and an army detachment stationed there arising out of strike-breaking activities of a few internees. (See W.R.A. Semi-Annual Report, July 1 to Dec. 31, 1943, p. 20.) It has been charged that Caucasian internal security police at the camp brutally beat several helpless internees into insensibility without cause. (See American Civil Liberties Union-News, San Francisco, August, 1944.) The authorities in charge are reluctant to divulge the results of their investigations into the cause of this brutality. Are we to believe that because the injured were hospitalized at government expense that the camp was a

sanctuary and that the bludgeoning of helpless citizens was justified because the medical staff needed patients upon whom to exercise their medical skill? Thereafter, several hundred internees were dragged from the shacks that housed them and held incommunicado in a special prison within the camp boundaries known as "The Stockade", the detention varying from a few days to in excess of eleven months. No complaints were lodged against the prisoners and no hearings were granted them. The stockade is mentioned in the W.R.A. reports merely as "an isolation area". Barbarism has its own peculiar nomenclature.

Although the interned citizens of military age are not free agents it has been the policy of the administration to induct them into the Army. Those who by reason of their imprisonment and impoverishment have refused to report for induction have been indicted for a violation of the draft law.* The administration's act in imprisoning them raises the presumption that it suspects them of disloyalty. It inducts them into the Army from imprisonment and thereby admits their loyalty. The inconsistency of its position is susceptible of no explanation except caprice. It falls into the same class of arbitrariness as General DeWitt's orders prohibiting soldiers of Japanese ancestry from enter-

*The practice of indicting imprisoned Nisei for refusing to report for induction has been condemned as a denial of due process of law. See *U.S. v. Kuwabara*, 56 Fed. Supp. 716, under which District Judge Goodman, releasing 26 Nisei, declared it "to be shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion."

ing the forbidden areas set up by him. Evidently the administration shares the view with General DeWitt that a person admittedly loyal in one part of the country is disloyal in another, the measure of a loyal citizen being his ancestral line. The fact that an administrative branch of government ignored traditional legal rights and indicted these Nisei under such circumstances indicates an interest in persecution and a disinterest in the administration of justice. Persecution is an attribute of the concentration camp.

We entertain the view that a concentration camp is one in which innocent citizens are imprisoned without charge of crime being lodged against them and held without a hearing of any sort before a competent tribunal and where they are subjected to abusive treatment. These camps meet this description. No intelligent effort was made to ascertain whether there were any spies or saboteurs in their midst. The F.B.I. looked elsewhere, knowing these camps harbored none. If these camps contained any persons who were not friendly to this nation it is to be remembered that there existed no reliable evidence or reasonable suspicion that any of them would have raised a hand against this nation. It is no more likely that any of them would have done so than that any other group of citizens white or yellow would have done so. The proclivities of the average white citizen do not differ from those of the average yellow.

While the evacuation of these citizens startled a sober thinking part of our populace a few notorious agitators seeking the doubtful benefits of cheap but

sensational publicity protested not only the miserable shelter given these unfortunates but also begrudged them the very food they consumed and declared they were being coddled by the administration.

CONCLUSION.

No other military commander in our history ever perpetrated such an outrage or exerted such a mischievous power over the lives and destinies of American citizens as General DeWitt. We do not believe that the intelligence of one military commander is to be the measuring rod by which a military necessity is to be determined when the rights of some 130,000 civilians are involved. If Congress could vest such power in him it could lodge all power in the executive. In such an event the Constitution would become a nullity and our Courts would exist by sufferance and be permitted to act only as apologists for dictatorial action while the populace winced under the lash of tyranny. Neither the congressional nor the judicial mantle has yet grown so threadbare that our representatives and judicial officers must wear the livery of the executive instead of that of the nation.

It was Oswald Spengler who observed that the advent of Caesarism brings "that kind of government which, irrespective of any constitutional formulation that it may have, is in its inward self a return to thorough formlessness". (Decline of the West, vol. 2, p. 431.) Rationalizing the Constitution to justify an invasion not only of its express provisions but of its

very spirit distorts it into formlessness and spells its doom. It is a poor patching of fig leaves to conceal the naked Truth. The majority opinion injects into the Constitution the foreign germs of its decay. It needs but one additional decision of like import to write its final epitaph and the tribunal entrusted with its guardianship will have become its destroyer. The Founding Fathers never intended such a power to be exercised by this Court and the nation would not approve it were it aware of its real significance.

For the foregoing reasons we demand this petition be granted and that upon a rehearing of the cause the judgment be reversed that the mission for which this Court was ordained be fulfilled and that justice be done the petitioner.

Dated, San Francisco, California,
February 5, 1945.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition for rehearing is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
February 5, 1945.

WAYNE M. COLLINS,
Counsel for Petitioner.

UPREME COURT OF THE UNITED STATES.

No. 22.—October Term, 1944.

Fred Toyosaburo Korematsu, Petitioner, *vs.* The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 18, 1944.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent was convicted in a federal district court for remaining in San Leandro, California, a "Military Area", contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U. S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed,[1] and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that

". . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restric-

[1] 140 F. 2d (C. C. A. 9).

tions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . ."

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi* v. *United States*, 320 U. S. 81, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True,

exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra*, at p. 99, ". . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the con-

tention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.[2]

We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, 547; *Block* v. *Hirsh*, 256 U. S. 135, 154-5. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kawato*, 317 U. S. 69, 73. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands. There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." 7 Fed. Reg. 2601. That "future order", the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons

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[2] Hearings before the Subcommittee on the National War Agencies Appropriation Bill for 1945, 608 726; Final Report, Japanese Evacuation from the West Coast, 1942, 309-327;

Part II, — e on Immigration and presentatives, 78th Cong., other bills to expatriate ited States, pp. 37-42, 49-58;

of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 21 and May 3rd orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as "assembly centers", in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from military area No. 1 to restrict and regulate such migration." Public Proclamation No. 4, 7 Fed. Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did re-

port to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. *Blockburger* v. *United States*, 284 U. S. 299, 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to congressional enactment, should not be treated as separate offenses.

The *Endo* case, decided today, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via

an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

Mr. Justice FRANKFURTER, concurring.

According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area

No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, *i. e.*, by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in *Hirabayashi* v. *United States*, 320 U. S. 81, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully". *Hirabayashi* v. *United States, supra* at 93. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. To recognize that military orders are "reasonably expedient military precautions" in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of

; and see Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398, 426.

"The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations", Hamilton v. Kentucky Distilleries Co.

the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare *Interstate Commerce Comm.* v. *Brimson*, 154 U. S. 447; 155 U. S. 3, and *Monongahela Bridge* v. *United States*, 216 U. S. 177. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not mine.

Mr. Justice ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was *Hirabayashi* v. *United States*, 320 U. S. 81, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily to leave and, so, knowingly and intentionally, defying the order and the Act of Congress.

The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

December 8, 1941, the United States declared war on Japan.

February 19, 1942, the President issued Executive Order No. 9066,[1] which, after stating the reason for issuing the order as "protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities", provided that certain Military Commanders might, in their discretion, "prescribe military areas" and define their extent, "from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions", the "Military Commander may impose in his discretion."

February 20, 1942, Lieutenant General DeWitt was designated Military Commander of the Western Defense Command embracing the westernmost states of the Union,—about one-fourth of the total area of the nation.

March 2, 1942, General DeWitt promulgated Public Proclamation No. 1,[2] which recites that the entire Pacific Coast is "particularly subject to attack, to attempted invasion . . . and, in connection therewith, is subject to espionage and acts of sabotage". It states that "as a matter of military necessity" certain military areas and zones are established known as Military Areas Nos. 1 and 2. It adds that "Such persons or classes of persons as the situation may require" will, by subsequent orders, "be excluded from all of Military Area No. 1" and from certain zones in Military Area No. 2. Subsequent proclamations were made which, together with Proclamation No. 1, included in such areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and Utah, and the southern portion of Arizona. The orders required that if any person of Japanese, German or Italian ancestry residing in Area No. 1 desired to change his habitual residence he must execute and deliver to the authorities a Change of Residence Notice.

San Leandro, the city of petitioner's residence, lies in Military Area No. 1.

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[1] 7 Fed. Reg. 1407.

[2] 7 Fed. Reg. 2320.

On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the President, to prevent espionage and sabotage, had authorized the Military to exclude him from certain areas and to prevent his entering or leaving certain areas without permission. He was on notice that his home city had been included, by Military Order, in Area No. 1, and he was on notice further that, at sometime in the future, the Military Commander would make an order for the exclusion of certain persons, not described or classified, from various zones including that in which he lived.

March 21, 1942, Congress enacted[3] that anyone who knowingly "shall enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander" shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in *Hirabayashi* v. *United States*, *supra*.

March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.

March 27, 1942, by Proclamation No. 4,[4] the General recited that "it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese *voluntarily migrating* from Military Area No. 1 to restrict and regulate such migration"; and ordered that, as of March 29, 1942, "all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."[5]

No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4 he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive

[3] 56 Stat. 173.

[4] 7 Fed. Reg. 2601.

[5] The italics in the quotation are mine. The use of the word "voluntarily" exhibits a grim irony probably not lost on petitioner and others in like case. Either so, or its use was a disingenuous attempt to camouflage the compulsion which was to be applied.

Order No. 9066 and the Act of Congress meant what they said: to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.

May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34[6] providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and non-alien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, *supra*. It is important to note that the order, by its express terms, had no application to persons within the bounds "of an established Assembly Center pursuant to instructions from this Headquarters" . . ." The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.

The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document—and, in the light of the above recitation, I think it is not—that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the

[6] 7 Fed. Reg. 3967.

area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty and convicted. Sentence was suspended and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102[7] establishing the War Relocation Authority under which, so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has been confined either in an Assembly Center, within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in *Endo* v. *United States* (No. 70 of this Term) demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34 ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the *Hirabayashi* case, *supra*, to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature,—a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court. I might agree with the court's disposition of the hypothetical case.[8] The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a con-

[7] 7 Fed. Reg. 2165.

[8] My agreement would depend on the definition and application of the terms "temporary" and "emergency". No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained at the date of the restraint out of which the litigation arose. Cf. Chastleton Corp. v. Sinclair, 264 U. S. 543.

flagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the *Hirabayashi* case would be authority for sustaining it. But the facts above recited, and those set forth in *Endo* v. *United States, supra*, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?

These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the *Endo* case, *supra*. The answer, of course, is that

where he was subject to two conflicting laws he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him, in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

Mr. Justice MURPHY, dissenting.

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that

has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." *Sterling* v. *Constantin*, 287 U. S. 378, 401.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States* v. *Russell*, 13 Wall. 623, 627-8; *Mitchell* v. *Harmony*, 13 How. 115, 134-5; *Raymond* v. *Thomas*, 91 U. S. 712, 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearing, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the danger of invasion, sabotage and espionage. But the exclusion, either ten

porarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area.[1] In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast.[2] In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal,[3] or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by ber-

[1] Final Report, Japanese Evacuation from the West Coast, 1942, by Lt. Gen. J. L. De Witt. This report is dated June 5, 1943, but was not made public until January, 1944.

[2] Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 239-40 (78th Cong., 1st Sess.):

"I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. . . . The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. . . ."

[3] The Final Report, p. 9, casts a cloud of suspicion over the entire group by saying that "while it was *believed* that *some* were loyal, it was known that many were not." (Italics added.)

tain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion."[4] They are claimed to be given to "emperor worshipping ceremonies"[5] and to "dual citizenship."[6] Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty,[7] together with facts as to certain persons being educated and residing at length in Japan.[8] It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so."[9] The need for protective

[4] Final Report, p. vii; see also pp. 9, 17. To the extent that assimilation is a problem, it is largely the result of certain social customs and laws of the American general public. Studies demonstrate that persons of Japanese descent are readily susceptible to integration in our society if given the opportunity. Strong, The Second-Generation Japanese Problem (1934); Smith, Americans in Process (1937); Mears, Resident Orientals on the American Pacific Coast (1928); Millis, The Japanese Problem in the United States (1942). The failure to accomplish an ideal status of assimilation, therefore, cannot be charged to the refusal of these persons to become Americanized or to their loyalty to Japan. And the retention by some persons of certain customs and religious practices of their ancestors is no criterion of their loyalty to the United States.

[5] Final Report, pp. 10-11. No sinister correlation between the emperor worshipping activities and disloyalty to America was shown.

[6] Final Report, p. 22. The charge of "dual citizenship" springs from a misunderstanding of the simple fact that Japan in the past used the doctrine of *jus sanguinis*, as she had a right to do under international law, and claimed as her citizens all persons born of Japanese nationals wherever located. Japan has greatly modified this doctrine, however, by allowing all Japanese born in the United States to renounce any claim of dual citizenship and by releasing her claim as to all born in the United States after 1925. See Freeman, "Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law," 28 Cornell L. Q. 414, 447-8, and authorities there cited; McWilliams, Prejudice, 123-4 (1944).

[7] Final Report, pp. 12-13. We have had various foreign language schools in this country for generations without considering their existence as ground for racial discrimination. No subversive activities or teachings have been shown in connection with the Japanese schools. McWilliams, Prejudice, 121-3 (1944).

[8] Final Report, pp. 13-15. Such persons constitute a very small part of the entire group and most of them belong to the Kibei movement—the actions and membership of which are well known to our Government agents.

[9] Final Report, p. 10; see also pp. vii, 9, 15-17. This insinuation, based purely upon speculation and circumstantial evidence, completely overlooks the fact that the main geographic pattern of Japanese population was fixed many years ago with reference to economic, social and soil conditions. Limited

custody is also asserted. The report refers without identity to "numerous incidents of violence" as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself" and that the general public "was ready to take matters into its own hands."[10] Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area,[11] as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.[12] A military judgment

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occupational outlets and social pressures encouraged their concentration near their initial points of entry on the Pacific Coast. That these points may now be near certain strategic military and industrial areas is no proof of a diabolical purpose on the part of Japanese Americans. See McWilliams, Prejudice, 119-121 (1944); House Report No. 2124 (77th Cong., 2d Sess.), 59-93.

[10] Final Report, pp. 8-9. This dangerous doctrine of protective custody, as proved by recent European history, should have absolutely no standing as an excuse for the deprivation of the rights of minority groups. See House Report No. 1911 (77th Cong., 2d Sess.) 1-2. Cf. House Report No. 2124 (77th Cong., 2d Sess.) 145-7. In this instance, moreover, there are only two minor instances of violence on record involving persons of Japanese ancestry. McWilliams, What About Our Japanese Americans? Public Affairs Pamphlets, No. 91, p. 8 (1944).

[11] Final Report, p. 18. One of these incidents (the reputed dropping of incendiary bombs on an Oregon forest) occurred on Sept. 9, 1942—a considerable time after the Japanese Americans had been evacuated from their homes and placed in Assembly Centers. See New York Times, Sept. 15, 1942, p. 1, col. 3.

[12] Special interest groups were extremely active in applying pressure for mass evacuation. See House Report No. 2124 (77th Cong., 2d Sess.) 154-6; McWilliams, Prejudice, 126-8 (1944). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that "We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss

based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.[13]

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese-Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese-Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence."[14] Yet nearly four months elapsed

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them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either." Quoted by Taylor in his article "The People Nobody Wants," 214 Sat. Eve. Post 24, 66 (May 9, 1942).

[13] See notes 4-12, *supra*.

[14] Final Report, p. vii; see also p. 18.

after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free,[15] a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.[16] Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way

[15] The Final Report, p. 34, makes the amazing statement that as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Apparently, in the minds of the military leaders, there was no way that the Japanese-Americans could escape the suspicion of sabotage.

[16] During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a "friendly enemy." About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, "The Enemy Alien Problem in the Present War," 34 Amer. Journ. of Int. Law 443, 444-46; House Report No. 2124 (77th Cong., 2d Sess.), 280-1.

by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Mr. Justice JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But here an

attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If we do

Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, unfested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what

Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."[1] A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi* v. *United States*, 320 U. S. 81, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do. He said: "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute *afforded a reasonable basis for the action taken in imposing the curfew*." 320 U. S. at 101. "We decide only the issue as we have defined it—we decide only that the *curfew order* as applied, and at the time it was applied, was within the boundaries of the war power." 320 U. S. at 102. And again: "It is unnecessary to consider whether or to what extent *such findings would support orders differing from the curfew order*." 320 U. S. at 105. (Italics supplied.) However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if

[1] Nature of the Judicial Process, p. 51.

that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.